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ARTICLES

TOWARD NAKBA AS A LEGAL CONCEPT

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The law does not possess the language that we desperately need to accurately capture the totality of the Palestinian condition. From occupation to apartheid and genocide, the most commonly applied legal concepts rely on abstraction and analogy to reveal particular facets of subordination. This Article introduces Nakba as a legal concept to resolve this tension. Meaning "Catastrophe" in Arabic, the term "al-Nakba" (النكبة) is often used to refer to the ruinous process of establishing the State of Israel in Palestine. But the Nakba has undergone a metamorphosis; it has evolved from a historical calamity into a brutally sophisticated structure of oppression. This ongoing Nakba includes episodes of genocide and variants of apartheid but remains rooted in a historically and analytically distinct foundation, structure, and purpose.

This Article therefore proposes to distinguish apartheid, genocide, and Nakba as different, yet overlapping, modalities of crimes against humanity. It first identifies Zionism as Nakba's ideological counterpart and insists on understanding these concepts as mutually constitutive. Considering the limits of existing legal frameworks, this Article goes on to analyze the legal anatomy of the ongoing Nakba. It positions displacement as the Nakba's foundational violence, fragmentation as its structure, and the denial of self-determination as its purpose. Taken together, these elements give substance to a concept in the making that may prove useful in other contexts as well.

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"*This is a unique colonialism that we've been subjected to where they have no use for us. The best Palestinian for them is either dead or gone. It's not that they want to exploit us, or that they need to keep us there in the way of Algeria or South Africa as a subclass.*"

— Edward Said.[1]

INTRODUCTION

Legal theory still lacks an adequate analytical framework to describe the reality of domination and violence in Palestine. The law does not possess the language we desperately need to accurately capture the totality of Palestinian subjugation. Instead, we resort to a dictionary of misnaming, one that distorts our understanding of the problem, obfuscates its inception, and misplaces its spatial and temporal coordinates. From occupation to apartheid and genocide, the most commonly applied legal concepts rely on abstraction and analogy, revealing particular facets of subordination. While these concepts are certainly helpful, they risk distorting the variegated structure behind the Palestinian reality, and their invocation has often muted Palestinian articulations of their own experience.

There is a dire need for a new approach. This Article introduces the concept of Nakba to legal discourse to encapsulate the ongoing structure of subjugation in Palestine and derive a legal formulation of

1. Edward W. Said, The Pen and the Sword 54 (1994).

the Palestinian condition. Meaning "catastrophe" in Arabic, the term "al-Nakba" (النكبة) is often used—as a proper noun, with a definite article—to refer to the ruinous establishment of Israel in Palestine,[2] a chronicle of partition, conquest, and ethnic cleansing that forcibly displaced more than 750,000 Palestinians from their ancestral homes and depopulated hundreds of Palestinian villages between late 1947 and early 1949.[3] But the Palestinian Catastrophe—the Nakba—remains an ongoing and unrelenting ordeal, one that has never been resolved but rather managed.

The Nakba has thus undergone a metamorphosis. The mid-twentieth century mass expulsion of Palestinians from their homes by Zionist paramilitary forces, and then by the army of the newly founded Israeli state, transformed the Nakba into a tenacious system of Israeli domination; a "Nakba regime" grounded in the destruction of Palestinian society and the continuous denial of its right to self-determination. The spectacular violence of conquest, dispossession, and displacement evolved into a brutally sophisticated regime of oppression. Across Israel, the West Bank, the Gaza Strip, Jerusalem, and refugee camps, Palestinians now occupy distinctive and discounted coordinates in a convoluted matrix of law, whereas Jewish Israelis maintain a singular and superior status, regardless of territorial divisions.

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2. See Lila Abu-Lughod & Ahmad H. Sa'di, Introduction: The Claims of Memory, *in* Nakba: Palestine, 1948, and the Claims of Memory 1, 3 (Ahmad H. Sa'di & Lila Abu-Lughod eds., 2007) [hereinafter Nakba: Palestine]; About the Nakba, United Nations: The Question of Palestine, https://www.un.org/unispal/about-the-nakba/ [https://perma.cc/4PGF-NLYZ] (last visited Mar. 30, 2024).

3. See Ilan Pappé, The 1948 Ethnic Cleansing of Palestine, J. Palestine Stud., Autumn 2006, at 6, 7. As early as September 1949, the United Nations Conciliation Commission for Palestine reported over 710,000 Palestinian refugees, excluding thousands of internally displaced people. See Conciliation Comm'n for Palestine, Gen. Progress Rep. & Supplementary Rep. on Its Fifth Session, Supp. No. 18 at app. 4, ¶ 15, U.N. Doc. A/1367/Rev.1 (1951) ("The estimate of the statistical expert, which the Committee believes to be as accurate as circumstances permit, indicates that the refugees from Israel-controlled territory amount to approximately 711,000."); see also Benny Morris, The Birth of the Palestinian Refugee Problem Revisited 1 (2004) [hereinafter Morris, Palestinian Refugee Problem] (noting that from November 1947 to October 1950 "an estimated 600,000 to 760,000 Palestinian Arabs departed their homes, moving to other parts of Palestine (i.e., the West Bank and Gaza Strip) or abroad, primarily to Jordan, Syria and Lebanon").

Historian Walid Khalidi's seminal book *All That Remains* provided the first comprehensive documentation of 418 villages that were depopulated and partly or largely destroyed in 1948 and its aftermath. All That Remains (Walid Khalidi ed., 1992) [hereinafter Khalidi, All That Remains]. Khalidi's list of villages excludes, for example, the localities of Bedouin communities in the Naqab; Khalidi estimates that between 70,000 and 100,000 Bedouin refugees were uprooted. Id. at 582. Salman Abu-Sitta's compendium *The Atlas of Palestine* identified over one hundred additional villages, bringing unparalleled detail to the widely cited figure of about 530 villages. See Salman H. Abu-Sitta, The Atlas of Palestine, 1917–1966, at 106–19 (2010). For a brief etymology of the concept of Nakba and its usages, see infra section III.A.

Palestinians, meanwhile, have never recovered[4] from the material and psychic reality of the 1948 Nakba: For every household there is a Nakba story, for each refugee a stolen home.[5] The conditions that the Nakba

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4. The understanding of the Nakba as an ongoing condition precludes an entirely post-hoc analysis. Palestinian and other mental health experts have long criticized existing frameworks to assess the exposure to trauma in a prolonged reality of political violence and domination. See, e.g., Olivia Goldhill, Palestine's Head of Mental Health Services Says PTSD Is a Western Concept, Quartz (Jan. 13, 2019), https://qz.com/1521806/palestines-head-of-mental-health-services-says-ptsd-is-a-western-concept [https://perma.cc/6U22-Q8AN] ("What is sick, the context or the person? In Palestine, we see many people whose symptoms—unusual emotional reaction or a behaviors—are a normal reaction to a pathogenic context . . . . There is no 'post' because the trauma is repetitive and ongoing and continuous." (internal quotation marks omitted) (quoting Dr. Samah Jabr, Chair of the Mental Health Unit at the Palestinian Ministry of Health)); see also Brian K. Barber, Clea A. McNeely, Eyad El Sarraj, Mahmoud Daher, Rita Giacaman, Cairo Arafat, William Barnes, Mohammed Abu Mallouh, Mental Suffering in Protracted Political Conflict: Feeling Broken or Destroyed, PLoS ONE, May 27, 2016, at 6 ("The construct for broken/destroyed was identified upon close examination of the sub-codes for the political and health domains.").

5. Oral history plays a crucial role in understanding the full scope of the Nakba. Hundreds of Nakba testimonies are accessible online through the databases of the Palestinian Oral History Archive at the American University of Beirut and the Zochrot Collection of Nakba Testimonies. See Palestinian Oral History Archive, Am. Univ. Beirut, https://libraries.aub.edu.lb/poha/ [https://perma.cc/ELZ7-AWWM] (last visited Mar. 30, 2024); Testimonies, Zochrot, https://www.zochrot.org/testimonies/all/en?Testimonies_ [https://perma.cc/S8CG-TNWB] (last visited Mar. 30, 2024). Some of these testimonies have been transcribed and translated into English through the Nakba Archive. See About, Nakba Archive, https://www.nakba-archive.org/ [https://perma.cc/CQB7-HA55] (last visited Apr. 12, 2024).

Palestinians have also written important personal accounts of the Nakba. E.g., Fawaz Turki, The Disinherited: Journal of a Palestinian Exile (1972); Sami Hadawi, Catastrophe Overtakes the Palestinians: Memoirs, Part II, Jerusalem Q., Summer 2014, at 100; Adel Manna, From Seferberlik to the Nakba: A Personal Account of the Life of Zahra Al-Ja'uniyya, Jerusalem Q., Spring 2007, at 59. Many of these accounts have also been published in English in the *Journal of Palestine Studies*. See, e.g., Muhammad Hallaj, Recollections of the Nakba Through a Teenager's Eyes, J. Palestine Stud., Autumn 2008, at 66; Ghada Karmi, The 1948 Exodus: A Family Story, J. Palestine Stud., Winter 1994, at 31; Mamdouh Nofal, Fawaz Turki, Haidar Abdel Shafi, Inea Bushnaq, Yezid Sayigh, Shafiq Al-Hout, Salma Khadra Jayyusi & Musa Budeiri, Reflections on Al-Nakba, J. Palestine Stud., Autumn 1998, at 5; Elias Srouji, The Last Days of "Free Galilee": Memories of 1948, J. Palestine Stud., Fall 2003, at 55; Um Jabr Wishah, Palestinian Voices: The 1948 War and Its Aftermath, J. Palestine Stud., Summer 2006, at 54.

Journalist Rosemary Sayigh's work *The Palestinians* produced an early and pioneering account of the Nakba based on extensive interviews with Palestinian refugees. Rosemary Sayigh, The Palestinians (1979).

For an account of my grandmother's Nakba testimony, see Rabea Eghbariah, The Nakba of Nazmiya Al-Kilani, Jadaliyya (May 15, 2023), https://www.jadaliyya.com/Details/45041 [https://perma.cc/UN4X-V8RR].

Oral history is an especially important source given the Israeli government's history of manipulating Israeli archives as well as obliterating and looting Palestinian archives. See, e.g., Nahla Abdo & Nur Masalha, Introduction to An Oral History of the Palestinian Nakba 1 (Nahla Abdo & Nur Masalha eds., 2019) (using "oral history, personal memories, narratives and interviews to study, analyse and represent the Palestinian Nakba/genocide"); Nur Masalha, The Palestine Nakba: Decolonising History, Narrating the Subaltern,

created have become an infernal feature of Palestinian existence that extends from the twentieth into the twenty-first century. Put simply, an ongoing Nakba.[6]

For those expelled, refugeehood has become a form of permanent exile;[7] three generations after the 1948 Nakba, millions are still being born

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Reclaiming Memory 137–39, 143–47 (2012) (describing instances in which Israeli officials have "looted or destroyed" Palestinian archives and artifacts); Seth Anziska, The Erasure of the Nakba in Israel's Archives, J. Palestine Stud., Autumn 2019, at 64, 66–68 (describing the Israeli government's efforts to conceal and remove archival documents in order to reshape "how the past is narrated and who is believed"); Ariella Azoulay, Photographic Conditions: Looting, Archives, and the Figure of the "Infiltrator", Jerusalem Q., Winter 2015, at 6, 10 ("Looting was not a single past instance; the looting of Palestinian archives has been an ongoing procedure . . . ."); Hagar Shezaf, Burying the Nakba: How Israel Systematically Hides Evidence of 1948 Expulsion of Arabs, Haaretz (July 5, 2019), https://www.haaretz.com/israel-news/2019-07-05/ty-article-magazine/.premium/how-israel-systematically-hides-evidence-of-1948-expulsion-of-arabs/0000017f-f303-d487-abff-f3ff69de0000 (on file with the *Columbia Law Review*) ("Since the start of the last decade, [Israeli] Defense Ministry teams have been scouring Israel's archives and removing historic documents. . . . Hundreds of documents have been concealed as part of a systematic effort to hide evidence of the Nakba.").

6. I first explored the ongoing Nakba as a legal concept in a piece that the *Harvard Law Review* solicited, edited, approved, and then nixed. Natasha Lennard, *Harvard Law Review* Editors Vote to Kill Article About Genocide in Gaza, The Intercept (Nov. 21, 2023), https://theintercept.com/2023/11/21/harvard-law-review-gaza-israel/ [https://perma.cc/NSD5-HEL5]. *The Nation* published a full version of the piece prefaced by a note explaining the "'unprecedented decision' by the leadership of the *Harvard Law Review* to prevent the piece's publication." See Rabea Eghbariah, The *Harvard Law Review* Refused to Run This Piece About Genocide in Gaza, The Nation (Nov. 21, 2023), https://www.thenation.com/article/archive/harvard-law-review-gaza-israel-genocide/ [https://perma.cc/8Q82-JGXR].

The decision spurred wide public condemnation, including the public dissent of over twenty-five editors. Letter from Int'l Solidarity Team, Academia for Equal., to Bd. of Eds., Harv. L. Rev., Your Decision Regarding Rabea Eghbariah's *HLR Online* Article—Upholding Freedom of Speech Requires Courage (Dec. 11, 2023), https://663a4684-b06c-4c86-9e17-b8de8637525a.usrfiles.com/ugd/663a46_72d448d12f57411e8e0a6ad537c81569.pdf [https://perma.cc/U8SU-8BPM]; Alonso Gurmendi, Open Statement by University Law Teachers on Academic Freedom, OpinioJuris (Dec. 8, 2023), https://opiniojuris.org/2023/12/08/open-statement-by-university-law-teachers-on-academic-freedom/ [https://perma.cc/X28W-3XQJ]; Hina Uddin, Opinion, The *Harvard Law Review*'s Palestine Exception, The Crimson (Dec. 1, 2023), https://www.thecrimson.com/article/2023/12/1/uddin-harvard-palestine-exception/ [https://perma.cc/3VNG-EGUE]. The *NYU Review of Law and Social Change* republished the piece and included a statement from its board noting that "we cannot allow those who seek to silence Palestinians to obfuscate the scope and genocidal nature of this tragedy." Rabea Eghbariah, The Ongoing Nakba: Toward a Legal Framework for Palestine, 48 N.Y.U. Rev. L. & Soc. Change: Harbinger 94 (2023), https://socialchangenyu.com/harbinger/toward-a-legal-framework-for-palestine/ [https://perma.cc/Y47H-3RDK] [hereinafter Eghbariah, The Ongoing Nakba].

I am thankful to the student editors with the *Columbia Law Review* for pursuing this Article and demonstrating an extraordinarily principled, professional, and unwavering commitment to (academic) freedom in a climate of intense intimidation and unparalleled repression.

7. The concept of exile is a central feature of the Palestinian experience. See Edward Said, Reflections on Exile and Other Essays 173 (2002) ("Exile is strangely compelling to think about but terrible to experience. It is the unhealable rift forced between a human

into refugee status and languishing in refugee camps.[8] For those who managed to remain within the 1949 armistice territories delineating Israel's unofficial borders, nineteen years of military rule followed,[9] marking the beginning of institutional subjugation and second-class citizenship.[10] For those who lived in or were displaced to the West Bank,

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being and a native place, between the self and its true home: its essential sadness can never be surmounted.").

8. Palestinian refugees inhabit a unique legal status in the international legal order as the 1951 Refugee Convention effectively excluded them from its purview. See Susan M. Akram, Palestinian Refugees and Their Legal Status: Rights, Politics, and Implications for a Just Solution, J. Palestine Stud., Spring 2002, at 36, 38–40. The international community has since managed the precarious situation of Palestinian refugees through the combination of the United Nations Conciliation Commission for Palestine (UNCCP) and the United Nations Relief and Works Agency for Palestine Refugees (UNRWA). Id. For a review of the legal status of Palestinian refugees, see generally Francesca P. Albanese & Lex Takkenberg, Palestinian Refugees in International Law (2d ed. 2020); Akram, supra. According to UNRWA, "Nearly one-third of the registered Palestine refugees, more than 1.5 million individuals, live in 58 recognized Palestine refugee camps in Jordan, Lebanon, the Syrian Arab Republic, the Gaza Strip and the West Bank, including East Jerusalem." Palestine Refugees, UN Relief & Works Agency for Palestine Refugees Near E., https://www.unrwa.org/palestine-refugees [https://perma.cc/96EC-MF63] (last visited Apr. 12, 2024). This number does not reflect the nearly 1.9 million Palestinians displaced during the unfolding genocide in the Gaza strip. Hostilities in the Gaza Strip and Israel | Flash Update #68, U.N. Off. for Coordination Humanitarian Affs. (Dec. 13, 2023), https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-68 [https://perma.cc/BC39-247M] ("As of 12 December, according to UNRWA, almost 1.9 million people in Gaza, or nearly 85 per cent of the population, are estimated to be internally displaced, many of them have been displaced multiple times.").

9. Shira Robinson, Citizen Strangers 38–47 (2013) ("By far the most important step that Zionist leaders took to ensure absolute Jewish rule over the Palestinians who remained in Israel was to entrench rather than abolish the military regime they had established after the formal end of the war."); see also Sabri Jiryis, Inst. for Palestine Stud., The Arabs in Israel, 1948–1966, at 119–74 (Meric Dobson trans., 1969) (describing the conditions faced by Palestinians in Israel prior to 1967); Yair Bäuml, Israel's Military Rule Over Its Palestinian Citizens (1948–1968), *in* Israel and Its Palestinian Citizens 103, 108–12 (Nadim M. Rouhana ed., 2017) (describing the creation and operation of the post-Nakba military government); Mansour Nasasra, Two Decades of Bedouin Resistance and Survival Under Israeli Military Rule, 1948–1967, 56 Middle E. Stud. 64, 64–66 (2020) (recounting the operation of Israeli military rule in the Naqab). For further insightful studies of the military rule imposed on Palestinian citizens, see generally Al-Aqlīyah Al-'Arabīyah Al-Filasṭīnīyah fī Isrā'īl: Fī Ẓili Al-Ḥukm Al-'Askarī Wa'irthih [The Arab Palestinian Minority in Israel in the Shadow of the Military Rule and Its Legacy] (Mustafa Kabaha ed., 2014); Hillel Cohen, Good Arabs: The Israeli Security Agencies and the Israeli Arabs, 1948–1967 (2010).

10. See Robinson, supra note 9, at 188–93 (noting the ways in which Palestinians were denied meaningful citizenship under military rule). For additional scholarship on the legal status of Palestinian citizens of Israel, see Mazen Masri, The Dynamics of Exclusionary Constitutionalism 4 (2017) (discussing the tensions and challenges of Israel's self-definition as a "Jewish and democratic" state, particularly in a state with a large indigenous, non-Jewish minority population); Hassan Jabareen, Hobbesian Citizenship: How the Palestinians Became a Minority in Israel, *in* Multiculturalism and Minority Rights in the Arab World 189, 193 (Will Kymlicka & Eva Pföstl eds., 2014) [hereinafter Jabareen, Hobbesian Citizenship] (discussing the creation of "Hobbesian citizenship" for Palestinians in 1949 and 1950, which distinguished Palestinians as "the conquered, occupied, and defeated community"); Nimer

the Gaza Strip, Jerusalem, or the Syrian Golan Heights, the extension of the Israeli occupation in 1967 has brought about further displacement[11] and decades of military domination, siege, and annexation, imposing divergent realities on these locales.[12] Israeli policies and practices of dispossession and displacement have continued to crisscross these legally fragmented geographies to grant Jewish Israelis exclusive property rights throughout the entirety of the land.[13]

Sultany, The Legal Structure of Subordination: The Palestinian Minority and Israeli Law, *in* Israel and Its Palestinian Citizens, supra note 9, at 191, 191 (describing how Israeli law "generally advanced, justified, and perpetuated a separate and inferior status for the Palestinian citizens in Israel").

In 2018, Israel added a constitutional layer to the inferiority of Palestinian citizens by enacting a Basic Law known as the Jewish Nation-State Law. See Hassan Jabareen & Suhad Bishara, The Jewish Nation-State Law: Antecedents and Constitutional Implications, J. Palestine Stud., Winter 2019, at 43, 50.

11. As Israel occupied the West Bank, it displaced some 200,000 Palestinians to Jordan. See Atwa Jaber, No Bridge Will Take You Home: The Jordan Valley Exodus Remembered Through the UNRWA Archives, Jerusalem Q., Winter 2023, at 10, 20. An additional 130,000 Syrians and Palestinians have been forcibly displaced from the occupied Golan Heights, where Israel depopulated over 130 villages. See Tayseer Mara'i & Usama R. Halabi, Life Under Occupation in the Golan Heights, J. Palestine Stud., Autumn 1992, at 78–79.

12. While international law still clusters the West Bank, the Gaza Strip, and East Jerusalem under the single label of "Occupied Palestinian Territories," the indefinite reality of occupation has manifested through different Israeli legal designations and governance structures in each of these locales. Although formal annexation took place only in 1980, Israel extended its law to East Jerusalem immediately after occupying that area in 1967 and designated the Palestinian Jerusalemite population as residents but not citizens, a disenfranchised, precarious, and revocable legal status. Compare Law and Administration Ordinance (Amendment No. 11) Law, 5727–1967, LSI 21 75 (1966–67) (Isr.) (allowing, in 1967, the Israeli government to extend Israeli law to any area by order), and Municipalities Ordinance (Amendment No. 6) Law, 5727–1967, LSI 21 75 (1966–67) (Isr.) (allowing, in 1967, the Israeli government to extend the boundaries of any Israeli municipality into areas where Israeli law had been extended), with Basic Law: Jerusalem, Capital of Israel, 5740–1980, LSI 34 209 (1979–80), as amended (Isr.) (designating "Jerusalem, complete and united" as the capital of Israel).

In contrast, the Palestinian populations in the West Bank and Gaza have remained subjects of Israeli control but neither citizens nor residents of the Israeli state. Freedom in the World 2024: West Bank, Freedom House, https://freedomhouse.org/country/west-bank/freedom-world/2024 [https://perma.cc/2L83-G2X5] (last visited Mar. 30, 2024) (describing the administrative status of Palestinian people living in the West Bank and Gaza). The emergence of the Palestinian Authority and the fragmentation of the West Bank into areas A, B, and C has further complicated this legal structure. See id. The chasm between the legal status of Palestinians in Gaza and Palestinians in the West Bank was further cemented after the Israeli blockade on the Gaza Strip in 2007, which imposed severely brutal restrictions on movement of both people and goods. Freedom in the World 2024: Gaza Strip, Freedom House, https://freedomhouse.org/country/gaza-strip/freedom-world/2024 [https://perma.cc/SUF6-CS53] (last visited Mar. 30, 2024).

For a visualization of these fragmentary policies, see Conquer and Divide, B'Tselem, https://conquer-and-divide.btselem.org/map-en.html [https://perma.cc/KJ68-ZJQW] (last visited Apr. 11, 2024). For more on the structure of fragmentation, see infra section III.B.2.

13. Rabea Eghbariah, Jewishness as Property Under Israeli Law, Law & Pol. Econ. Project Blog (July 9, 2021), https://lpeproject.org/blog/jewishness-as-property-under-israeli-law/ [https://perma.cc/KZY4-Y4KE].

Institutionalizing the reality of the Nakba has therefore not only birthed a structure of legal fragmentation but also has instilled one of Jewish supremacy, under which Jewishness has served as the ultimate key to citizenship, rights, and resources.[14] The compounded structure of legal fragmentation includes at least five legal statuses for Palestinians—citizens of Israel, residents of Jerusalem, residents of the West Bank, residents of Gaza, or refugees—that set their respective sociolegal positionalities in the system. Each of these "fragments" is subject to a distinctive dialectic of violence and relative legal privilege in which power dynamics and control mechanisms operate uniquely and shape the experiences of those within its sphere. The Israeli regime has thus crafted an institutional design that is premised on different and mutating laboratories of oppression,[15] together forming a totality of evolving domination best identified through the concept of Nakba and its structure of fragmentation.[16]

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14. Id.; see also B'Tselem, A Regime of Jewish Supremacy From the Jordan River to the Mediterranean Sea: This Is Apartheid 2 (2021), https://www.btselem.org/sites/default/files/publications/202101_this_is_apartheid_eng.pdf [https://perma.cc/2GPN-UJMY] ("In the entire area between the Mediterranean Sea and the Jordan River, the Israeli regime implements laws, practices and state violence designed to cement the supremacy of one group – Jews – over another – Palestinians."); Jabareen & Bishara, supra note 10, at 52 (arguing that the enactment of the 2018 Jewish Nation State Law has contributed to "the consolidation of Jewish ethnic supremacy and domination").

15. The concept "laboratories of oppression" echoes the concept of "laboratories of democracy" that Justice Louis Brandeis originated in *New State Ice Co. v. Liebmann*. See 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Brandeis's Zionist legacy and his contribution to the colonization of Palestine remains unrecognized at best, or celebrated at worst, in American legal education. For more on Brandeis's Zionism, see generally Louis Brandeis, Brandeis on Zionism: A Collection of Addresses and Statements (1942).

I first thought of the concept of "laboratories of oppression" in conversation with Alice Speri from *The Intercept*. See Alice Speri, Labs of Oppression, The Intercept (Apr. 1, 2023), https://theintercept.com/2023/04/01/israel-palestine-apartheid-settlements/ [https://perma.cc/2AY2-P5TR]. The concept of "laboratories of oppression" invites further scrutiny into the functions and profits that each laboratory generates. See Antony Loewenstein, The Palestine Laboratory: How Israel Exports the Technology of Occupation Around the World 15 (2023) (examining "[h]ow Israel has exported the occupation and why it's such an attractive model" and arguing that Palestine has served as a "laboratory for methods of control and separation of populations"); Darryl Li, The Gaza Strip as Laboratory: Notes in the Wake of Disengagement, J. Palestine Stud., Winter 2006, at 38, 38–39 (arguing that Gaza functions as an experimental zone for the Israeli government to test means of control to later be used in the West Bank).

16. The emergence of a regime premised on legal fragmentation is the result of both classic divide-and-conquer tactics and the lack of an overall Israeli "solution" or "exit strategy" for the Palestinian population that remained in Palestine and came under Israeli rule. The intense contradictions that underpin the Israeli desire to acquire the land but not its Palestinian population have increasingly produced fragmentation as a structure of governance. Israeli Prime Minister Benjamin Netanyahu encapsulated this logic by asserting in 2019 that "whoever wants to prevent a Palestinian state must support Hamas and the transfer of money to Hamas . . . . This is part of our strategy—to divide and distinguish the Palestinians in Gaza from the Palestinians in Judea and Samaria [i.e., the occupied West Bank]." Shaul Arieli, Opinion, HaFalstinim l'o Yevatru al A'za t [The Palestinians Will Not Give Up Gaza], Haaretz (Aug. 25, 2022), https://www.haaretz.co.il/opinions/2022-08-

From 1948 until the present, the evolution of the Nakba into ongoing Nakba has resembled the Palestinian present continuous,[17] an ongoing reality characterized by displacement and replacement.[18] And yet, the imbrication of the concept of Nakba in law remains unrecognized and often misnamed. This Article brings Nakba to the center of legal analysis, considering it as an independent legal concept encapsulating a distinctive category of violence committed against a group.[19] To understand the Palestinian condition in law, this Article proposes an approach that considers Nakba as a legal concept capable of encompassing a phenomenon that has included genocide, apartheid, and military occupation but remains rooted in historically and analytically distinct foundation, structure, and purpose.[20]

To advance this overarching argument, this Article proceeds as follows. Part I traces the origins of Nakba to Zionism—a European political ideology that pursued the creation of a Jewish state in Palestine—and argues that Zionism and Nakba are mutually constitutive. The emergence of modern Zionism has not only displaced Palestinians from Palestine but also replaced Europe's "Jewish Question" with the ostensibly non-European "Question of Palestine." Colonization and expulsion constituted an overarching logic of Zionism, culminating in the reality of

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25/ty-article-opinion/.premium/00000182-d4df-d9c0-a3d3-fcdff75e0000 (on file with the *Columbia Law Review*) (author's translation). The evolution of this regime has not been comprehensively examined in legal literature, although the concept of fragmentation as domination is often invoked as part of the apartheid analysis. For further discussion on fragmentation, see infra section III.B.2.

17. Much like the present continuous verb tense, it is defined by its ongoing and present nature.

18. For imagery of pre-1948 Nakba Palestine, see generally Teresa Aranguren & Sandra Barrilaro, Against Erasure: A Photographic Memory of Palestine Before the Nakba (Haymarket Books 2024) (Róisín Davis & Hugo Rayón Aranguren trans., 2016) (documenting, through photographs, pre-1948 Palestinian life); Ariella Azoulay, From Palestine to Israel: A Photographic Record of Destruction and State Formation, 1947–1950 (2011) ("Bringing these photographs together allowed me to create a new archive: a civil archive which makes it possible to view the catastrophe they recorded."); Walid Khalidi, Before Their Diaspora: A Photographic History of the Palestinians, 1876–1948 (2d ed. 1991) [hereinafter Khalidi, Before Their Diaspora] ("[A] retrospective glance can also serve a constructive purpose. That is the intent of this book, which it is hoped will shed some light on the Palestinians as a people in Palestine before their diaspora, and on the genesis and evolution of the Palestine problem during its formative phase.").

19. This Article uses the term "Nakba" in three distinct ways: "1948 Nakba" to refer to the foundational event(s) of the Palestinian Nakba; "ongoing Nakba" to refer to the continuous Palestinian reality since 1948; and "Nakba," without a definite article, to refer to the concept of Nakba more broadly, including in law. Since this Article focuses on the concept of Nakba as applied to Palestine, it capitalizes the term in all instances.

20. The terms "ethnic cleansing" and "settler colonialism" are two additional frameworks often invoked to describe the reality of Palestinians. The exclusion of these terms from Part II stems from the fact that neither ethnic cleansing nor settler colonialism are doctrinally consolidated or codified legal frameworks. The discussion in the introduction to Part II and Part III expands on the placement of settler colonialism and ethnic cleansing in the context of the Nakba.

Nakba. And yet, the very occurrence of the foundational violence of the Nakba is widely denied, dismissed, downplayed, or excused to salvage the ideology of Zionism.[21] To recognize the legal concept of Nakba, this Article first identifies Zionism as its ideological counterpart and insists on understanding Zionism in terms of the Nakba it produced.

Part II considers three overlapping legal frameworks that have been widely applied to Palestine—occupation, apartheid, and genocide—and shows that these frameworks, while useful, remain incapable of capturing the totality of the Palestinian condition.[22] The Nakba has encompassed

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21. For examples of such scholarship, see infra notes 35, 36, 39, 40, 119, 148, and 149. In 2011, the Israeli Parliament passed a law known as the "Nakba Law," which authorized defunding any public institution—including Palestinian cultural or educational institutions in Israel—that engages in activities commemorating the Nakba. The Israeli Supreme Court has dismissed a challenge to the Nakba Law, citing the ripeness doctrine and dismissing the chilling effect the law creates. HCJ 3429/11 Alumni Ass'n of the Arab Orthodox Sch. in Haifa v. Minister of Fin., 2012 Isr. Law Rep. 55; see also Adalah and ACRI: Israeli High Court Ignored the Chilling Effect Already Caused by the "Nakba Law," Adalah (Jan. 5, 2012), https://www.adalah.org/en/content/view/7188 [https://perma.cc/7KMV-BJPP] (describing how the court's ruling encourages discrimination against Arabs in Israel); Shira Kadari-Ovadia, Israeli University Cancels Event Marking Nakba Day, Citing Violation of Law, Haaretz (May 16, 2019), https://www.haaretz.com/israel-news/2019-05-16/ty-article/.premium/in-first-israeli-university-bans-political-event-citing-violation-of-nakba-law/ (on file with the *Columbia Law Review*) (describing how the Nakba Law allows Israel to limit funds to institutions that treat Independence Day as a day of mourning for the hundreds of thousands of Arabs displaced during the 1948 war); Shira Kadari-Ovadia, Israel's Education Ministry Includes Anti-Nakba Clause in Tender, Haaretz (Apr. 14, 2022), https://www.haaretz.com/israel-news/2022-04-14/ty-article/.premium/israels-education-ministry-includes-anti-nakba-clause-in-tender/00000180-5ba8-db1e-a1d4-dfe905900000 (on file with the *Columbia Law Review*) (describing the Education Ministry's decision to conflate the day of mourning in reference to Nakba day with Holocaust denial); Sawsan Zaher, The Prohibition on Teaching the Nakba in the Arab Education System in Israel, Adalah's Newsl. (Adalah, Haifa, Isr.), Sept. 2010, https://www.adalah.org/uploads/oldfiles/newsletter/eng/sep10/docs/Sawsan%20Nakba%20English%20final.pdf [https://perma.cc/Q25N-YM9D] (describing the vast repercussions of the Knesset Members' decision to prohibit any reference to the Nakba as a day of mourning). For scholarship that further explores this phenomenon of Nakba denial, see generally Ronit Lentin, Co-Memory and Melancholia: Israelis Memorialising the Palestinian Nakba (2010); Saree Makdisi, Tolerance Is a Wasteland: Palestine and the Culture of Denial (2022); Nur Masalha, The Politics of Denial: Israel and the Palestinian Refugee Problem (2003); Ilan Pappe, Nakba Denial and the "Peace Process," *in* The Ethnic Cleansing of Palestine (2006) [hereinafter Pappe, Ethnic Cleansing]; Maha Nassar, Exodus, Nakba Denialism, and the Mobilization of Anti-Arab Racism, 49 Critical Socio. 1037 (2023); Uri Ram, Ways of Forgetting: Israel and the Obliterated Memory of the Palestinian Nakba, 22 J. Hist. Socio. 366 (2009).

22. While this Article argues for the recognition of the Nakba as such, it simultaneously recognizes the value and importance of analogies. The tensions between the universal and the particular is a theme that accompanies this Article and invites further reflections. This Article understands the particularity of the Nakba as reinforcing, rather than undermining, universal lessons. For the importance of analogy in the case of Palestine, see Masha Gessen, In the Shadow of the Holocaust, New Yorker (Dec. 9, 2023), https://www.newyorker.com/news/the-weekend-essay/in-the-shadow-of-the-holocaust (on file with the *Columbia Law Review*) (arguing that "[f]or the last seventeen years, Gaza has been a hyperdensely populated, impoverished, walled-in compound where only a small fraction of the

different legal concepts in a way that makes it fulfill these legal definitions at various junctures, all the while transcending their limits. One key to resolving this tension lies in the recognition of Nakba as a distinct legal concept.

Part III thus moves forward to articulate the form and substance of Nakba as a legal concept. While the frameworks of apartheid and genocide loom over discussions of the Nakba, this Article proposes to distinguish between these three concepts as different, yet overlapping, modalities of crimes against humanity. Deriving a legal understanding of Nakba from its juxtaposition with the most recognizable crimes against groups—genocide and apartheid—allows for the synthesis of existing paradigms into a new concept. Part III thus poses three questions: What is the foundational violence of Nakba? What is the structure of Nakba? And what purpose does Nakba serve? In a nutshell, this Article positions displacement as Nakba's foundational violence, fragmentation as its structure, and the denial of self-determination as its purpose. Taken together, these components provide an initial legal anatomy of the ongoing Nakba and give substance to a concept in the making.

The conclusion therefore calls for articulating a vision that undoes the Nakba and remedies its persisting abuses. Undoing the Nakba is the only way to transition to a more just and equitable legal and political system that will safeguard the well-being of all people in the territory between the Jordan River and the Mediterranean Sea. This Article suggests five main components as an initial framework toward that end: recognition, return, reparation, redistribution, and reconstitution. Taken together, these components ultimately mean dismantling the regime of domination and reconstructing an egalitarian political framework (or several such frameworks) based on a recognition of the Nakba's historical and ongoing injustice; the implementation of the right of return; and a combination of reparations and redistribution as a material remedy to the persisting harms of the Nakba.

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population had the right to leave for even a short amount of time—in other words, a ghetto"); Eric Levitz, Masha Gessen on Israel, Gaza, and Holocaust Analogies, N.Y. Mag. (Dec. 23, 2023), https://nymag.com/intelligencer/2023/12/masha-gessen-on-israel-gaza-and-holocaust-analogies.html [https://perma.cc/6RRT-GT5J] ("[I]f the whole rationale for maintaining Holocaust memory is the promise of 'Never again' — is the pledge to learn from history — then how in the world do you learn from history . . . if you say that it cannot be compared to anything that is going on now?"). For making this analogy, Masha Gessen's Hannah Arendt award ceremony was suspended in Germany. Kate Connolly, Award Ceremony Suspended After Writer Compares Gaza to Nazi-Era Jewish Ghettos, The Guardian (Dec. 14, 2023), https://www.theguardian.com/world/2023/dec/14/award-ceremony-suspended-after-writer-masha-gessen-compares-gaza-to-nazi-era-jewish-ghettos [https://perma.cc/9BCV-UQBD].

The genocide in Gaza has underscored the centrality of Palestine to the international legal order.[23] As the world continues to face the consequences and legacies of colonialism, Palestine remains the most vivid manifestation of the colonial ordering that the international community purports to have transcended.[24] Precisely because of this feature, undoing

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23. Naming the genocide in Gaza is not contingent upon a final finding by a legal tribunal. See Eghbariah, The Ongoing Nakba, supra note 6, at 94–95 ("Some may claim that the invocation of genocide, especially in Gaza, is fraught. But does one have to wait for a genocide to be successfully completed to name it?" (footnotes omitted)). We know that Israel is committing a genocide in Gaza not because a legal tribunal said so, but because genocidal intent permeates Israeli society, military, and politics and because it is corroborated by the material reality of Palestinians in Gaza. While the International Court of Justice has recognized South Africa's case charging Israel of genocide as "plausible," its ruling is best understood as declarative rather than constitutive. See Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Order, 2024 I.C.J. No. 192, ¶ 54 (Jan. 26), https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf [https://perma.cc/L9MW-R77T] ("In the Court's view, the facts and circumstances mentioned above are sufficient to conclude that at least some of the rights . . . for which [South Africa] is seeking protection are plausible. This is the case with respect to the right of the Palestinians in Gaza to be protected from acts of genocide and related prohibited acts . . . .").

For a database containing over 500 instances of Israeli incitement to genocide, see Law for Palestine Releases Database With 500+ Instances of Israeli Incitement to Genocide—Continuously Updated, Law for Palestine (Jan. 4, 2024), https://law4palestine.org/law-for-palestine-releases-database-with-500-instances-of-israeli-incitement-to-genocide-continuously-updated [https://perma.cc/BTN7-9BVZ].

Reports, expert opinions, and court documents have compiled undeniably strong evidence showing that Israel is committing genocidal acts in Gaza. See, e.g., Human Rights Council, Anatomy of a Genocide—Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territory Occupied Since 1967, U.N. Doc. A/HRC/55/73 (Mar. 24, 2024), https://www.un.org/unispal/document/anatomy-of-a-genocide-report-of-the-special-rapporteur-on-the-situation-of-human-rights-in-the-palestinian-territory-occupied-since-1967-to-human-rights-council-advance-unedited-version-a-hrc-55 [https://perma.cc/EBX2-HV6D] [hereinafter Anatomy of a Genocide]; Application Instituting Proceedings 1 (S. Afr. v. Isr.), https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf [https://perma.cc/8SZQ-XQVW]; Complaint at 1–2, Def. for Child. Int'l—Palestine v. Biden, No. 3:23-cv-05829 (filed Nov. 13, 2023), https://ccrjustice.org/sites/default/files/attach/2023/11/Complaint_DCI-Pal-v-Biden_ww.pdf [https://perma.cc/H9W4-MXM5]; Declaration of William A. Schabas in Support of Plaintiffs' Motion for Preliminary Injunction at 1, *Def. for Child. Int'l*, No. 3:23-cv-05829 (filed Nov. 16, 2023), https://ccrjustice.org/sites/default/files/attach/2023/11/Declaration%20Expert%20William%20Schabas_w.pdf [https://perma.cc/Y4Q7-ULLN].

24. A vast body of scholarship has articulated the symbiosis between colonialism and international law. See generally Anthony Anghie, Imperialism, Sovereignty, and the Making of International Law (2007); Siba N'Zatioula Grovogui, Sovereigns, Quasi Sovereigns, and Africans: Race and Self-Determination in International Law (1996); Martti Koskenniemi, The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960 (2001); Makau Mutua, Savages, Victims, Saviors: The Metaphor of Human Rights, 42 Harvard Int'l L.J. 201 (2001). For a discussion on the placement of Palestine within Third World Approaches to International Law (TWAIL) literature, see Roundtable: Locating Palestine in Third World Approaches to International Law, 52 J. Palestine Stud., no. 4, 2023, at 100, 101 (observing that "[i]nternational law in its past and present is deeply implicated in the

the Nakba offers an opportunity to reconstruct the international legal structure and restore faith in the project of international law or, indeed, in the very notion of universal norms.[25] Dismantling the ongoing Nakba is not only a pressing shared responsibility; it is also an auspicious possibility.

The objective of this Article is not to examine the legality of the Nakba as much as to generate a legal framework from the Palestinian experience of the ongoing Nakba. Therefore, this Article neither provides a comprehensive legal history of Palestine nor engages in a doctrinal examination of Israeli violations of international law.[26] Instead, it seeks to transcend existing legal limits and imagine new ways of apprehending the Palestinian condition in law, and by extension, new ways of thinking about undoing the oppressive structures that international law has nurtured and sustained. This Article may thus offer more questions than provide answers, including ones about the applicability of the concept of Nakba to other contexts.[27]

Taking a generative approach to legal doctrine allows us to reassess the often-contradictory international legal corpus and unshackle Palestinians from the unjust legal structures that have often been implemented to confine them.[28] Seeing Palestine through the framework of Nakba allows us to take an unflinching look at the material reality and legal structures that

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settler colonization of Palestine and the subordination of Palestinians" and discussing the placement within and absence of Palestine from "the overall canon of TWAIL scholarship").

25. Reflective of this sentiment are the words of Irish lawyer Blinne Ní Ghrálaigh in the closing remarks of South Africa's case before the International Court of Justice charging Israel of genocide. Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Verbatim Record, 70 ¶ 28 (Jan. 11, 2024, 10 a.m.), https://www.icj-cij.org/sites/default/files/case-related/192/192-20240111-ora-01-00-bi.pdf [https://perma.cc/X3QU-XG5D] ("Some might say that the very reputation of international law—its ability and willingness to bind and to protect all peoples equally—hangs in the balance.").

26. See, e.g., Press Release, Security Council, Israel's Settlements Have No Legal Validity, Constitute Flagrant Violation of International Law, Security Council Reaffirms, U.N. Press Release SC/12657 (Dec. 23, 2016).

27. See infra section III.B.

28. If Israel has never abided by United Nations Resolution 181 (II), see G.A. Res. 181 (II) (Nov. 29, 1947) (regarding the Partition of Palestine), or Security Council Resolution 242, see S.C. Res. 242 (Nov. 22, 1967) (regarding Israel's withdrawal from "territories" occupied in the aftermath of 1967), why should Palestinians or the international community continue to accept these legal frameworks as the limits of their imagination? See Richard Falk, International Law and the Al-Aqsa Intifada, Middle E. Rep., Winter 2000, at 16, 16–18 (arguing that Israel has acted "in consistent and relentless defiance of the overwhelming will of the organized international community" as "expressed through widely supported resolutions passed by the Security Council and the General Assembly of the United Nations"). The intention to defy the Partition Plan long predated the establishment of the Israeli state. In fact, accepting the resolution was simply a veneer to set facts on the ground. As the first Israeli Prime Minister Ben-Gurion himself put it: "We presume that this is only a temporary situation. We will settle first in this place, become a major power, and then find a way to revoke the partition. . . . I do not see partition as a final solution to the Palestine question." Tom Segev, A State at Any Cost 264 (2019) [hereinafter Segev, A State at Any Cost] (internal quotation marks omitted) (quoting David Ben-Gurion).

the 1948 Nakba has created, instead of blindly adopting the international fantasy of a "two-state solution."[29] The framework of Nakba allows us to reconsider the inextricable legal and political arrangements that govern the lives of Palestinians and Jewish Israelis between the Jordan River and the Mediterranean Sea, maintaining an ethnonational hierarchy that continues to produce an intense, brutal, and asymmetrical reality of death and violence.

This Article therefore posits Nakba as the most accurate framework to grasp the regime of domination in Palestine. This call is premised on the understanding that legal concepts do not exist in a vacuum, but within narratives that assign them meaning.[30] Historically and conceptually, the 1948 Nakba has existed at the juncture of the Holocaust and Apartheid South Africa.[31] The concept of Nakba thus provides an opportunity to generate an independent framework that structures the legal questions at play and moves beyond simple analogy. Recognizing Nakba not only bestows a belated recognition upon its primary victims and allows us to imagine liberatory, egalitarian, and just futures but also reinforces, rather than undermines, the universal lessons of the Holocaust by recognizing

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29. See Tareq Baconi, Opinion, The Two-State Solution Is an Unjust, Impossible Fantasy, N.Y. Times (Apr. 1, 2024), https://www.nytimes.com/2024/04/01/opinion/two-state-solution-israel-palestine.html (on file with the *Columbia Law Review*) ("Repeating the two-state solution mantra has allowed policymakers to avoid confronting the reality that partition is unattainable . . . and illegitimate as an arrangement originally imposed on Palestinians without their consent in 1947. . . . [T]he two-state solution has evolved to become a central pillar of sustaining Palestinian subjugation and Israeli impunity."). In the past few years, there has been a revived scholarly interest in revisiting the partition of Palestine and its legality. See generally The Breakup of India and Palestine (Victor Kattan & Amit Ranjan eds., 2023) (studying the partition of India and Palestine both separately and comparatively); Ardi Imseis, The United Nations and the Question of Palestine (2023) [hereinafter Imseis, United Nations and the Question of Palestine] (offering a meticulous legal examination of U.N. Resolution 181(II) to partition Palestine and analyzing the verbatim and summary records of the United Nations Special Committee on Palestine recommending partition); Partitions: A Transnational History of Twentieth-Century Territorial Separatism (Arie M. Dubnov & Laura Robson eds., 2019) [hereinafter Partitions] (exploring the origins of partition, focusing on Ireland, Palestine, and India and Pakistan); Penny Sinanoglou, Partitioning Palestine: British Policymaking at the End of Empire (2019) (studying the trajectory of partition in Palestine and uncovering how "in the eyes of many British officials, partition had become imaginable by the late 1920s, desirable by the mid-1930s, impossible by the late 1930s, and seemingly unavoidable by the mid-1940s").

30. See Robert M. Cover, The Supreme Court, 1982 Term—Foreword: Nomos and Narrative, 97 Harv. L. Rev. 4, 4–5 (1983) ("Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.").

31. See, e.g., Elias Khoury, Foreword to The Holocaust and the Nakba: A New Grammar of Trauma and History, at ix (Bashir Bashir & Amos Goldberg eds., 2019) [hereinafter The Holocaust and the Nakba] (addressing the "complicated and multilayered intersections of the Holocaust and Nakba"). The rise of the apartheid regime in South Africa following the elections in May 1948 took place in parallel with the 1948 Nakba. For more on the interconnected nature of Israel and Apartheid South Africa, see infra section II.B.

the grave dangers of situations in which victimhood is used and abused to victimize others.[32]

I. ZIONISM AS NAKBA

The year 1948 marks a key moment in the historical genesis of Nakba, signifying the mass displacement and dispossession of Palestinians from Palestine and the destruction and looting of Palestinian homes and villages by Zionist paramilitary groups.[33] This seismic experience violently shattered Palestinian life and restructured Palestinian existence. The 1948 Nakba has not only fragmented the territorial integrity of Palestine, constructing a self-identifying Jewish state on top of over seventy-seven percent of its conquered territory, but also ruptured and bifurcated Palestinian memory into "before" and "after."[34] Put simply, the 1948 Nakba has produced an ongoing Nakba; the first is an event, the latter is a structure and a continuous process.

Still, the very fact that the 1948 Nakba occurred—namely, the fact that Zionist paramilitary groups forcibly displaced hundreds of thousands of Palestinians from their homes, committed massacres, looted property, and

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32. It is important to note that, while Israel capitalized on the Holocaust to create a powerful narrative that monopolizes victimhood to the state, many of the actual victims of the Holocaust have often remained mistreated in and by Israel. See Zahava Solomon, From Denial to Recognition: Attitudes Toward Holocaust Survivors From World War II to the Present, 8 J. Traumatic Stress 215, 216 (1995) ("For the first 20 years after the Holocaust, the distress of the survivors went almost totally unacknowledged. . . . [T]he helping professions . . . engaged in what may be considered dual manifestations of the inability or unwillingness to cope with the survivors' experience: a conspiracy of silence and blaming the victim."); Yardena Schwartz, How the State of Israel Abuses Holocaust Survivors, Tablet (Jan. 25, 2017), https://www.tabletmag.com/sections/israel-middle-east/articles/israel-abuses-holocaust-survivors [https://perma.cc/BWT9-XGPK] (noting that since the end of WWII, Germany has paid "about $31 billion . . . to Holocaust victims in Israel," but that "more than 20,000 survivors in Israel had never received the government assistance owed to them" and "nearly a third . . . live below the poverty line"); see also Edward Said, The One State Solution, N.Y. Times (Jan. 10, 1999), https://www.nytimes.com/1999/01/10/magazine/the-one-state-solution.html [https://perma.cc/65QP-3472] ("Thus [the Palestinians] are the victims of the victims, the refugees of the refugees.").

33. This Article uses the phrase "1948 Nakba" to refer to the events between 1947 and 1949, which have defined the core structure of the ongoing Nakba. It is important to note, however, that while the year 1948 is a pivotal moment that marked the inception of the term as applied to Palestine, the structure of Zionist settler colonization, dispossession, and displacement long predated the seismic violence of that year. See Areej Sabbagh-Khoury, Colonizing Palestine: The Zionist Left and the Making of the Palestinian Nakba 15, 83–119 (2023). By 1948, some seventy Palestinian villages had already been depopulated and dispossessed in a process that Professor Areej Sabbagh-Khoury describes as "colonialism by purchase." Id.

34. See Ahmad Sa'di & Lila Abu-Lughod, Introduction to Nakba: Palestine, supra note 2, at 3 ("The Nakba has thus become, both in Palestinian memory and history, the demarcation line between two qualitatively opposing periods. After 1948, the lives of the Palestinians at the individual, community, and national level were dramatically and irreversibly changed.").

destroyed Palestinian localities in the process of establishing a Jewish state in Palestine—has often been denied, dismissed, or downplayed.[35] Instead, mythical accounts of Zionism and the establishment of the state of Israel have emerged to replace these realities in the West.[36] Under these myth-propagating epistemologies, the Palestinians themselves were the sole culprits of the Nakba: Zionism features in these accounts as a national movement that simply brought about the establishment of the State of Israel in response to centuries of Jewish persecution. Under this account, Israel is described as a tiny and premature nation that was bullied by neighboring Arab states yet miraculously still emerged triumphant.[37]

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35. For early works that established this phenomenon of Nakba denial under the pretext of knowledge production, see generally Jon Kimche & David Kimche, Both Sides of the Hill: Britain and the Palestine War (1960); Netanel Lorch, The Edge of the Sword: Israel's War of Independence, 1947–1949 (1961); Joseph B. Schechtman, The Arab Refugee Problem (1952). A similar line of works extended well into the 1980s and further entrenched these misconceptions. Professor Rashid Khalidi refers to Joan Peters's 1984 book *From Time Immemorial* to exemplify this phenomenon. See Rashid Khalidi, The Hundred Years' War on Palestine 11–12 (2020) [hereinafter Khalidi, Hundred Years' War] ("The idea that the Palestinians simply do not exist, or even worse, are the malicious invention of those who wish Israel ill, is supported by such fraudulent books as Joan Peters's *From Time Immemorial*, now universally considered by scholars to be completely without merit.").

36. See Avi Shlaim, The Debate About 1948, *in* The Israel/Palestine Question 150, 150–51, 164–65 (Ilan Pappé ed., 2005) (summarizing such accounts and noting that they are "not history in the proper sense of the word" and "little more than the propaganda of the victors"). Historian Ilan Pappe has described the efforts to combat this rewriting of history:

> [T]he victims of the ethnic cleansing started reassembling the historical picture that the official Israeli narrative of 1948 had done everything to conceal and distort. The tale Israeli historiography had concocted spoke of a massive 'voluntary transfer' of hundreds of thousands of Palestinians who had decided temporarily to leave their homes and villages so as to make way for the invading Arab armies bent on destroying the fledgling Jewish state. By collecting authentic memories and documents about what had happened to their people, Palestinian historians in the 1970s, Walid Khalidi foremost among them, were able to retrieve a significant part of the picture Israel had tried to erase. But they were quickly overshadowed by publications such as Dan Kurzman's *Genesis 1948* which appeared in 1970 and again in 1992 (now with an introduction by one of the executors of the ethnic cleansing of Palestine, Yitzhak Rabin, then Israel's prime minister).

Pappe, Ethnic Cleansing, supra note 21, at xiv.

37. Historian Michael Fischbach describes this narrative as "Nakba denial" and notes that it is premised on four commonly applied arguments. The first argument contends that "war is war," in which "tragic events inevitably occur." See Michael R. Fischbach, Nakba Denial: Israeli Resistance to Palestinian Refugee Reparations, *in* Time for Reparations 183, 191–93 (Jacqueline Bhabha, Margareta Matache & Caroline Elkins eds., 2021) [hereinafter Fischbach, Nakba Denial]. The second "equates the experience of Palestinian refugees with the experience of Jewish emigrants from Arab countries." Id. at 193–95. The third rejects "any individual or even collective obligations to Palestinians as refugees, or even as persons." Id. at 195–97. The fourth refuses any recognition of "'moral reparations' or other payments or statements that might constitute an admission of responsibility or guilt." Id. at 197–99.

If acknowledged as a people at all,[38] Palestinians are presented as the ones to blame for their "free" decision to flee their homes as part of an otherwise "natural" process of war.[39] According to more fanciful versions of this narrative, Zionists did not commit any systemic expulsions, massacres, looting, or dispossession during the war; in more sober versions, these occurrences were simply an ordinary feature of war. That Palestinian society was decimated in the process, or that Palestinian refugees have since been denied return features in this story is a marginal, rather than foundational, issue to Zionism or Israel.[40] Instead, the Israeli regime is described as a success story through which a liberal democracy emerged, a robust economy developed, and the desert finally bloomed.[41]

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38. This denial of Palestinian peoplehood is encapsulated in former Israeli Prime Minister Golda Meir's infamous statement that "[t]here was no such thing as Palestinians." See Frank Giles, Golda Meir: 'Who Can Blame Israel?', Sunday Times, June 15, 1969, at 12 (quoting Golda Meir). From Meir's time to the present, Israeli politicians and other supporters of Zionism have repeatedly denied the existence of the Palestinians as a people. Israeli Minister Bezalel Smotrich, for example, recently declared, "There is no such thing as a Palestinian nation. There is no Palestinian history. There is no Palestinian language[.]" Israeli Minister Condemned for Claiming 'No Such Thing' as a Palestinian People, The Guardian (Mar. 20, 2023), https://www.theguardian.com/world/2023/mar/20/israeli-minister-condemned-claiming-no-such-thing-as-a-palestinian-people-bezalel-smotrich [https://perma.cc/9U32-PZLA] (internal quotation marks omitted). Knesset Member Anat Berko once argued that the lack of the letter "P" in Arabic proves that there is no Palestinian people. Isabel Kershner, No 'P' in Arabic Means No Palestine, Israeli Lawmaker Says, N.Y. Times (Feb. 11, 2016), https://www.nytimes.com/2016/02/12/world/middleeast/israel-anat-berko-palestine.html (on file with the *Columbia Law Review*).

39. To this day, academics continue to produce these misleading and intellectually dishonest accounts. Compare, e.g., Efraim Karsh, Palestine Betrayed 2 (2010) (describing the mass expulsion of Palestinians prior to May 1948 as simply "300,000–340,000 [Palestinians] fleeing their homes"), and Efraim Karsh, Reclaiming a Historical Truth, Haaretz (June 10, 2011), https://www.haaretz.com/2011-06-10/ty-article/reclaiming-a-historical-truth/0000017f-dbff-db22-a17f-ffff2b5d0000 (on file with the *Columbia Law Review*) [hereinafter Karsh, Reclaiming a Historical Truth] (claiming that "the tragedy befalling the Palestinian Arabs in 1948 was exclusively of their own making"), with Walid Khalidi, Why Did the Palestinians Leave, Revisited, J. Palestine Stud., Winter 2005, at 42, 46–47 (debunking the myth that Arab leaders ordered Palestinians to leave their homes, in part by examining radio broadcasts that ordered various Palestinian professionals to "carry on their work as usual" and "continue their duties").

40. See, e.g., Alan Dershowitz, The Case for Israel 5 (2003) ("[N]o one will ever know—or convince his or her opponents—whether most of the Arabs who left Israel were chased, left on their own, or experienced some combination of factors that led them to move from one place to another."); Karsh, Reclaiming a Historical Truth, supra note 39 (describing "the tragedy befalling the Palestinian Arabs in 1948" as part of a larger "Arab-instigated exodus" scheme). Fischbach explains that this "counternarrative" in which "the tragedy of the refugees was not Israel's fault and that the continued plight of the refugees therefore is a problem for the Arab World and the United Nations, not Israel" is part of the broader phenomenon of Nakba denial. Fischbach, Nakba Denial, supra note 37, at 190–91.

41. See generally Yael Zerubavel, Desert in the Promised Land (2019) ("In the distinct 'spatial code' that emerged in the Zionist Hebrew culture in Palestine, the 'desert' and the 'settlement' constituted key symbolic landscapes, defined by their opposition as well as their interdependence."); Alan George, "Making the Desert Bloom": A Myth Examined, J. Palestine Stud., Winter 1979, at 88–89 (noting that Zionists' claims that they "made the

These narratives of Nakba denial are still present today throughout the mainstream milieus of Western politics and society at large.[42] And yet, one need not go to great lengths to set a few facts in place. Palestinian and other historiographies have produced an enormous body of knowledge about Palestine, Zionism, and the Nakba at least since the 1960s.[43] In the past few decades, this knowledge has been enriched and expanded on by seminal works documenting the foundational violence of the Nakba;[44] explicating the social, political, and economic conditions that predated it;[45] studying the political ideology of Zionism that underpinned it;[46] and highlighting the

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desert bloom" minimizes the Nakba, implying that "the country had been an almost unpopulated desert before the Zionists' arrival," and suggest that "they have a stronger claim to sovereignty over the country because they have exploited its agricultural potential more efficiently" (internal quotation marks omitted)); see also Meron Benvenisti, Sacred Landscape 2 (2000) ("As a member of a pioneering youth movement, I myself 'made the desert bloom' by uprooting the ancient olive trees of al-Bassa [a displaced Palestinian village] to clear the ground for a banana grove, as required by the 'planned farming' principles of my kibbutz, Rosh Haniqra.").

42. As a minister in British Columbia put it, Palestine was a "crappy piece of land with nothing on it": "There were several hundred thousand people but, other than that, it didn't produce an economy. It couldn't grow things. It didn't have anything on it." Rhianna Schmunk, B.C. Minister Under Fire for Comments About Middle East Before Creation of Israeli State, CBC News (Feb. 2, 2024), https://www.cbc.ca/news/canada/british-columbia/selina-robinson-israel-comments-calls-to-resign-1.7102824 [https://perma.cc/5GDF-LEKE] (internal quotation marks omitted) (quoting B.C. Minister Selina Robinson). EU President Ursula von der Leyen similarly stated, "Today, we celebrate 75 years of vibrant democracy in the heart of the Middle East. . . . You [Israel] have literally made the desert bloom." EU in Israel (@EUinIsrael), Twitter, at 0:21–0:41 (Apr. 26, 2023), https://x.com/EUinIsrael/status/1651088583644594177 (on file with the *Columbia Law Review*); see also Pauline Ertel, Germany: Berlin Schools Asked to Distribute Leaflet Describing the 1948 Nakba as a "Myth," Middle E. Eye (Feb. 23, 2024), https://www.middleeasteye.net/news/berlin-schools-handout-leaflet-myth-israel-1948 [https://perma.cc/8UMS-K53X].

43. One pioneering site of scholarship on Palestinian history in English has been the *Journal of Palestine Studies*, first published in 1971. For background on the *Journal*'s development and evolution, see generally Sherene Seikaly, In the Shadow of War: The *Journal of Palestine Studies* as Archive, 51 J. Palestine Stud., no. 2, 2022, at 5 [hereinafter Seikaly, JPS as Archive].

Early works in English also include From Haven to Conquest: Readings in Zionism and the Palestine Problem Until 1948 (Walid Khalidi ed., 1971) [hereinafter Khalidi, From Haven to Conquest]; Sami Hadawi, Bitter Harvest: Palestine Between 1914–1967 (1967); Palestine and the Arab-Israeli Conflict (Walid Khalidi & Jill Khadduri eds., 1974); The Transformation of Palestine (Ibrahim A. Abu-Lughod ed., 1987).

44. See generally, e.g., Khalidi, All that Remains, supra note 3; Khalidi, Before Their Diaspora, supra note 18; The Palestinian Nakba 1948: The Register of Depopulated Localities in Palestine (S. H. Abu-Sitta ed., 2000).

45. See, e.g., Beshara Doumani, Rediscovering Palestine: Merchants and Peasants in Jabal Nablus (1995); Samih K. Farsoun, Palestine and the Palestinians: A Social and Political History (2006); Rashid Khalidi, Palestinian Identity: The Construction of Modern National Consciousness (2010) [hereinafter Khalidi, Palestinian Identity]; Sherene Seikaly, Men of Capital: Scarcity and Economy in Mandate Palestine (2016) [hereinafter Seikaly, Men of Capital]; Salim Tamari, Mountain Against the Sea: Essays on Palestinian Society and Culture (2009).

46. See generally, e.g., Nur Masalha, Expulsion of the Palestinians: The Concept of "Transfer" in Zionist Political Thought, 1882–1948 (1992) [hereinafter Masalha, Expulsion of the Palestinians].

British indulgence for the Zionist project and, later, American patronage of Israel.[47]

It was not until the late 1980s that the most basic facts underpinning the Nakba began to be more widely recognized. In a series of studies published by a group of Israeli scholars often referred to as the "New Historians,"[48] the foundational myths about the establishment of Israel have become widely contested,[49] though not without attempts to justify the Nakba.[50] These studies corroborated existing Nakba historiographies and unveiled new facets of the 1948 Nakba by relying on declassified documents from Israeli archives.[51] The fact that Zionist militias forcibly displaced hundreds of thousands of Palestinians[52] who were then

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47. Rashid Khalidi, Brokers of Deceit: How the U.S. Has Undermined Peace in the Middle East, at x (2013) [hereinafter Khalidi, Brokers of Deceit] ("[A]n American-brokered political process . . . has reinforced the subjugation of the Palestinian people, provided Israel and the United States with a variety of advantages, and made considerably more unlikely the prospects of a just and lasting settlement of the conflict between Israel and the Arabs."); Khalidi, Hundred Years' War, supra note 35, at 13–14 ("Zionism initially had clung tightly to the British Empire for support, and had only successfully implanted itself in Palestine thanks to the unceasing efforts of British imperialism.").

48. See Ilan Pappé, Fifty Years Through the Eyes of "New Historians" in Israel, Middle E. Rep., Summer 1998, at 14, 14 (describing the "new historians" as "professional Israeli scholars" who "have been challenging the official Israeli version of the origins of Zionism and the birth of Israel" (internal quotation marks omitted)).

49. The most notable scholarship of the "New Historians" includes Simha Flapan, The Birth of Israel: Myths and Realities (1987); Morris, Palestinian Refugee Problem, supra note 3; Ilan Pappé, The Making of the Arab–Israeli Conflict, 1947–51 (1992) [hereinafter Pappé, Arab–Israeli Conflict]; Tom Segev, 1949: The First Israelis (1986); Avi Shlaim, Collusion Across the Jordan: King Abdullah, the Zionist Movement, and the Partition of Palestine (1988) [hereinafter Shlaim, Collusion].

50. Edward Said, New History, Old Ideas, Al-Ahram Wkly. (May 21, 1998), https://english.ahram.org.eg/NewsContent/50/1260/500760/AlAhram-Weekly/Nakba-remembered/New-history,-old-ideas.aspx [https://perma.cc/7B8J-6KSS] (last updated May 14, 2023) (describing the "profound contradiction, bordering on schizophrenia" that underlies most Israeli New Historians' commitment to ideological Zionism, which makes them "reluctant to draw the inevitable conclusions" from the evidence they produce). Compare Nur Masalha, The Palestine Nakba: Decolonising History, Narrating the Subaltern, Reclaiming Memory 148–200 (2012) (arguing that most Israeli "new historians" do not engage with "the nexus of power and knowledge – the immense power asymmetry between coloniser and colonised"), with Efraim Karsh, Fabricating Israeli History: The "New Historians" xv (2d ed. 2000) (noting that the publication of the book's first edition "was welcomed by those who had long been troubled by the 'revisionist' rewriting of history in a manner casting the birth of the Jewish State as the source of all evil").

51. The reliance on Israeli archives as the supreme source of knowledge production reified the archival power and access of the "New Historians" at the cost of dismissing and superseding Palestinian oral history. See, e.g., Morris, Palestinian Refugee Problem, supra note 3, at 4 ("I believe in the value of documents. . . . The value of oral testimony about 1948, if anything, has diminished with the passage of the 20 years since I first researched the birth of the Palestinian refugee problem.").

52. The question of whether Palestinians fled their homes because of fear or were actively expelled by Zionist forces is one of little importance. An Israeli Intelligence Service report assessed as early as June 30, 1948 that "the impact of 'Jewish military action'

prevented from returning to their homes is now indisputable.[53] That Zionist—and later Israeli—forces committed massacres, raped, and looted property is now an established, incontestable, scholarly fact.[54] The epistemic closures around the 1948 Nakba have started to form, albeit only in certain academic circles.

The following sections argue that Zionism must be understood in terms of the Nakba it generated. Destructive ideologies mirror the calamities they produce and often become defined from the perspective of their victims. Just as Nazi ideology produced the Holocaust and Afrikaner nationalism generated apartheid, Zionism similarly birthed the Nakba.

Section I.A traces Zionism to its European origins and argues that Zionism is a modern European phenomenon that furnished a national-colonial "solution" to European antisemitism through the colonization of Palestine and resettlement of Jews outside of Europe. Section I.B highlights the centrality of colonialism and expulsion to Zionist thought. Far from being incidental or marginal features, the recurring concepts of colonialism and expulsion were central to and constitutive of Zionist political thought. Zionism adopted settler colonialism as the vehicle for its nation-building project and fashioned expulsion as the solution to the problem posed by the existing Arab-Palestinian population in Palestine. Section I.C proceeds to outline the 1948 Nakba as the material manifestation or praxis of Zionism. Once placed in the context of the Nakba, the other facets of Zionism assume secondary importance. Put simply, Zionism was a modern European phenomenon born out of antisemitism, nationalism, and colonialism, and it is best understood through the prism of the Nakba it has brought about.

A. *From the Jewish Question to the Question of Palestine*

A search for the origins of the Nakba leads to Europe. The displacement of Palestinians during the 1948 Nakba is the result of a different type of displacement: that of Europe's "Jewish Question" onto Palestine. The "Jewish Question" became an increasingly commonplace way for Europeans to refer to the status of Jews in Europe throughout the

(Haganah and Dissidents) on the migration [i.e., displacement of Palestinians] was decisive, as some 70% of the residents left their communities and migrated as a result of these actions." Intelligence Service (Arab Section), Migration of *Eretz Yisrael* Arabs Between December 1, 1947 and June 1, 1948, https://www.akevot.org.il/wp-content/uploads/2019/07/1948ISReport-Eng.pdf [https://perma.cc/N9WL-88L5] (last visited May 5, 2024); see also Benny Morris, The Causes and Character of the Arab Exodus from Palestine: The Israel Defence Forces Intelligence Branch Analysis of June 1948, 22 Middle East Stud. 5, 5 (1986) (examining the document in detail).

53. Historian Adel Manna tells the story of those who attempted to return and sketches the Israeli law of deportation that developed in the aftermath of 1948. See generally Adel Manna, Nakba and Survival (2022) [hereinafter Manna, Nakba and Survival]. In some rare cases, those who managed to "infiltrate" back to their own homeland were reunited with their families and allowed to remain. That is the case of my grandfather.

54. See infra notes 167–171 and accompanying text.

second half of the nineteenth century.[55] This was particularly apparent in Germany, where the question essentially posed was, "[C]ould a Jew ever be a *true* German . . . ?"[56] In the post-Enlightenment era, during (and in some cases even *after*) the political, social, and legal emancipation of Jews in Europe, their increased visibility and social integration contributed to a heightened attention to the essentialized nature of Jew as "other."[57] The framing of Jewish presence in Europe as a "question" not only cast Jews as a problem but eventually manifested in genocide as its "[f]inal [s]olution."[58]

The Jewish experience of discrimination and emancipation varied widely across Europe. The process commonly known as "Jewish Emancipation" (Jews gaining civil, political, and legal rights) was protracted, nonlinear, and geographically variable—indeed, as some argue that "emancipation continues to the present."[59] For some Jews in western and central Europe, newly won rights and freedoms in the late nineteenth century opened the door to substantial upward social and economic mobility and accelerated the process of secularization, coupled with the integration and assimilation of some Jews in European societies.[60] But despite the proclamation of equality, the rights of Jews in Europe continued to suffer substantial setbacks and state infringement. Gentile perceptions of Jewish economic and racial difference involving the antisemitic stereotypes of control, greed, and dual loyalties became all the more prominent.[61]

At the turn of the century, the Dreyfus affair, wherein a French Jewish officer was falsely charged of treason, encapsulated and symbolized the persistence of antisemitism in France, where Jews supposedly enjoyed full civil rights.[62] In eastern Europe, where Jewish emancipation was not achieved until the 1917 Russian Revolution, most Jewish communities

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55. See, e.g., Lucy S. Dawidowicz, The War Against the Jews, 1933–1945, at xxxv–xxxvi (10th ed. 1986) ("The term 'Jewish question,' as first used during the early Enlightenment/Emancipation period in Western Europe, referred to the 'question' or 'problem' that the anomalous persistence of the Jews as a people posed to the new nation-states and the rising political nationalisms.").

56. Werner E. Mosse, From "*Schutzjuden*" to "*Deutsche Staatsbürger Jüdischen Glauben*": The Long and Bumpy Road of Jewish Emancipation in Germany, *in* Paths of Emancipation 59, 92 (Pierre Birnbaum & Ira Katznelson eds., 1995) (emphasis added).

57. Jonathan M. Hess, Germans, Jews and the Claims of Modernity 3–5 (2002).

58. Dawidowicz, supra note 55, at xxxv–xxxvi (internal quotation marks omitted); see also Derek J. Penslar, Zionism: An Emotional State 19 (2023) [hereinafter Penslar, Zionism] ("[T]he term . . . 'Jewish question' flourished in Europe from the 1840s until the Nazis attempted to solve it through a genocidal 'final solution.'").

59. David Sorkin, Jewish Emancipation: A History Across Five Centuries 5 (2019).

60. See Elmer Berger, Mendelssohn and Dreyfus *in* Khalidi, Haven to Conquest, supra note 43, at 57, 62.

61. Derek Penslar, Shylock's Children: Economics and Jewish Identity in Modern Europe 205–06 (2001).

62. Id.

continued to suffer from intense persecution and pogroms.[63] Reacting to this reality, the British government had passed the 1905 Aliens Act, which essentially controlled and restricted the immigration of Jews fleeing eastern Europe.[64] The status of Jews in Europe, in short, was dire.

Against this background, coupled with the proliferation of nationalism and the formation of European nation-states, the political ideology of Zionism emerged,[65] among other competing forms of Jewish politics.[66] As Professor Edward Said observed, unlike rival ideologies, "Zionism offered the neatness of a specific solution (or answer) to a specific problem."[67] Championed by Theodor Herzl, the founder of political Zionism, the Zionist movement promoted the idea of a Jewish nation-state as the exclusive solution to the "Jewish Question."[68] Herzl, influenced by the ideals of the Enlightenment and nationalism, sought to alter the social, political, and religious configurations that defined the Jewish people and reconstitute them as secular subjects organized under a nation-state with defined, sovereign territory rather than a religious or cultural community dispersed throughout Europe.[69]

Zionists, however, did not strive for a nation-state in Europe but rather sought to extend Europe elsewhere by the means of colonization.[70] Indeed, Zionism reproduced antisemitism's basic premise that Jews did not belong in Europe and therefore sought resettlement outside the continent.[71] Herzl understood and capitalized on this premise of

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63. See Sorkin, supra note 59, at 208, 278.

64. Bernard Gainer, The Alien Invasion 199–201 (1972) (noting the antisemitic and anti-immigrant motivations that drove the enactment of the Aliens Act following Jewish migration from eastern Europe in the late nineteenth century).

65. Theodor Herzl, The Jewish State 92–93 (Jacob M. Alkow, ed. & trans., Dover Publ'n Inc. 1988) (1896) [hereinafter Herzl, The Jewish State] ("The creation of a new State is neither ridiculous nor impossible. . . . The Governments of all countries scourged by Anti-Semitism will be keenly interested in assisting us to obtain the sovereignty we want.").

66. Zionism was far from a success story from its inception. It competed with other ideologies, such as the Jewish Labour Bund, which advanced a secular socialist ideology that rejected Zionism. See Walter Laqueur, A History of Zionism 273 (2003); see also Penslar, Zionism, supra note 58, at 35–36.

67. Edward Said, The Question of Palestine 25 (1979) [hereinafter Said, The Question of Palestine].

68. Herzl, The Jewish State, supra note 65, at 92 (arguing in response to the "Jewish Question" that "sovereignty be granted us over a portion of the globe large enough to satisfy the rightful requirements of a nation; the rest we shall manage for ourselves").

69. Id. at 92–95.

70. The centrality of the concept and method of colonization to Zionist thought is explored infra section I.B.

71. See Seikaly, Men of Capital, supra note 45, at 6 ("Zionism promised Jews who had suffered religious, political, and racial persecution for centuries in Europe that they could finally become European but only by *leaving* Europe. Anti-Semitism and Zionism had one thing in common: the belief that Jews could never assimilate in Europe."). For Hannah Arendt's views in this context, see generally Gabriel Piterberg, Zion's Rebel Daughter: Hannah Arendt on Palestine and Jewish Politics, New Left Rev., Nov.–Dec. 2007, at 39 (noting that Arendt believed that "Jewish identities could not, and should not, just be

antisemitism to advance Zionism, adopting some of the most antisemitic tropes about Jews in his infamous essay *Mauschel*. In this essay, he describes an eponymous anti-Zionist Jewish European character as a "distortion of human character, something unspeakably low and repugnant."[72] In his diaries, Herzl observed, "The anti-Semites will become our most dependable friends, the anti-Semitic countries our allies."[73]

The location that Zionists sought was Palestine. Although Palestine was not the only territory considered, it had certainly been the prime option for Zionist colonization from the outset.[74] In *Der Judenstaat* (*The State of Jews*), Herzl laid out his theory for a Jewish state and contemplated the idea of Palestine and Argentina as two possible alternatives.[75] While Argentina was "one of the most fertile countries in the world" with "a sparse population and a mild climate,"[76] Palestine was the "ever-memorable historic home."[77] Herzl wrote that if the Zionists managed to persuade the Ottoman sultan to establish a Jewish state in Palestine, the Zionists "should there form a portion of a rampart of Europe against Asia, an outpost of civilization as opposed to barbarism."[78]

But the mass colonization of Palestine remained out of reach at the turn of the century, and Herzl did not live to see his grandiose visions come

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dissolved into the surrounding citizenries of the various European nation-states" but that "the 'utterly unhistorical' theory of an unalterable Jewish essence—had proved disastrous"); Samantha Hill, Hannah Arendt Would Not Qualify for the Hannah Arendt Prize in Germany Today, The Guardian (Dec. 18, 2023), https://www.theguardian.com/commentisfree/2023/dec/18/hannah-arendt-prize-masha-gessen-israel-gaza-essay [https://perma.cc/97RM-PCWJ] ("Arendt was critical of the nation-state of Israel from its founding, in part because she was worried that the state would exhibit the worst tendencies of the European nation-state."). For a discussion of orientalism and Jews, see generally Amnon Raz-Krakotzkin, The Zionist Return to the West and the Mizrahi Jewish Perspective, *in* Orientalism and the Jews (Ivan Davidson Kalmar & Derek J. Penslar eds., 2020) ("[O]rientalism was essential to the nationalization of the Jewish collectivity and the ways in which the nation was imagined. . . . Despite the Zionist rejection of 'assimilationist trends,' it can be read as an extreme expression of the desire to assimilate the Jews into the Western narrative of enlightenment and redemption.").

72. Theodor Herzl, Mauschel, *in* Zionist Writings: Essays and Addresses 163, 164 (Harry Zohn trans., 1973); see also Daniel Boyarin, Unheroic Conduct 296 (1997) ("Herzl was indeed an antisemite, as were many Viennese Jews of the fin de siècle. He adopted all of the most vicious stereotypes of Jew hatred but employed an almost classic psychological move, splitting, in order to separate himself from them." (footnote omitted)); Derek Penslar, Theodor Herzl, Race, and Empire, *in* 12 Studia Judaeoslavica, Making History Jewish 185, 195 (Paweł Maciejko & Scott Ury eds., 2020) ("Jewish intellectuals of Herzl's era widely accepted many antisemitic critiques of alleged Jewish character flaws and socio-economic dysfunction yet rejected antisemitic views that Jews were irredeemably flawed.").

73. 1 Theodor Herzl, The Complete Diaries of Theodor Herzl 68 (Raphael Patai ed., Harry Zohn trans., 1960) [hereinafter Herzl, Complete Diaries].

74. See Herzl, The Jewish State, supra note 65, at 95–96.

75. Id.

76. Id. at 95.

77. Id. at 96.

78. Id.

true. Herzl's attempts to convince the Ottoman Sultan Abdul Hamid II to grant the Zionists a colonization charter in Palestine did not bear fruit.[79] Disappointed by the Ottomans and what appeared to be a lost quest for Palestine, Herzl turned to lobbying for British support.[80] In 1902, Herzl met with Lord Rothschild in London, where he proposed to petition the British for a "colonisation charter."[81] Concerned by the optics, Lord Rothschild instructed: "Don't say 'charter'. This word has a bad sound."[82] Herzl responded, "Call it what you please . . . I want to found a Jewish colony in a British possession."[83]

It is against this background that the "Uganda Scheme" emerged and several other colonial territories under British control were considered for Zionist settlement.[84] But these plans were abandoned not long after their inception, and the Zionist movement redoubled its efforts toward the colonization of Palestine.[85]

The fall of the Ottoman Empire brought about the British colonization of Palestine, entwined with the "colonisation charter"[86] that Herzl had long hoped for but did not live to witness. On November 2, 1917, as Jerusalem had not yet been occupied and the fighting with the Ottoman armies continued, the British Foreign Secretary Arthur Balfour issued a letter to the Zionist movement declaring:

> His Majesty's Government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious

79. Walid Khalidi, The Jewish-Ottoman Land Company: Herzl's Blueprint for the Colonization of Palestine, J. Palestine Stud., Winter 1993, at 30, 31–32.

80. Laqueur, supra note 66, at 119.

81. Id. at 120 (internal quotation marks omitted).

82. Id. (internal quotation marks omitted).

83. Id. (internal quotation marks omitted).

84. In the meeting described by Laqueur, Lord Rothschild proposed Uganda as the location for the establishment of the Jewish state, and while Herzl clearly preferred territories closer to Palestine—mentioning the Sinai Peninsula, Egyptian Palestine, or Cyprus—he later lobbied the Sixth Zionist Congress in 1903 to send a commission to East Africa to assess the conditions for Jewish colonization. The Uganda Scheme, however, threatened a split among the members of the Zionist movement and prompted negative reactions among the British colonial administration. Id at 119–29.

85. See Adam Rovner, In the Shadow of Zion: Promised Lands Before Israel 227 (2014) (writing that Africa was not "acknowledged as [a] Jewish home[]" because the "mythopoesis of Israel ultimately proved more potent a nationalist force than any other territory"); Robert G. Weisbord, African Zion: The Attempt to Establish a Jewish Colony in the East Africa Protectorate, 1903–1905, at 224–27 (1968) (describing how early Zionists renewed their efforts to colonize Palestine after plans to do so in East Africa proved unpopular within the Zionist movement).

86. Laqueur, supra note 66, at 120. (internal quotation marks omitted).

> rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.[87]

This letter, known as the Balfour Declaration,[88] was codified into the League of Nation's British Mandate for Palestine and therefore set the international legal framework for Zionist settler colonization over the following three decades.[89] The British Mandate, applied in the territory between the Jordan River and the Mediterranean Sea,[90] thus became the only case where the League of Nations mandate system has officially and successfully promoted a settler project under the auspices of one of its own mandates for colonial power.[91]

While the Declaration acknowledged and promoted Zionist interests, it defined the Arab-Palestinian majority—ninety-four percent of the population in 1917—as merely "non-Jewish communities" and promised them only "civil and religious rights" rather than national self-determination.[92] As Balfour would explicitly write to British Prime Minister Lloyd George, "[I]n the case of Palestine we deliberately and rightly decline to accept the principle of self-determination."[93]

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87. Letter from Arthur Balfour, British Foreign Sec'y, to Lionel Walter Rothschild (Nov. 2, 1917), https://ecf.org.il/media_items/297 [https://perma.cc/KH36-FMK9] [hereinafter Balfour Declaration] (internal quotation marks omitted).

88. See Zena Al Tahhan, More Than a Century On: The Balfour Declaration Explained, Al Jazeera (Nov. 2, 2018), https://www.aljazeera.com/features/2018/11/2/more-than-a-century-on-the-balfour-declaration-explained [https://perma.cc/2ASN-DPWX]. See generally Jonathan Schneer, The Balfour Declaration: The Origins of the Arab-Israeli Conflict (2010) (exploring the junctures, interests, and lobbying efforts that ultimately led Britain to support Zionism in the form of the Balfour Declaration).

89. Antony Anghie, Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations, 34 N.Y.U. J. Int'l L. & Pol. 513, 514–16 (2002) (describing the Mandate System as "an international regime created for the purpose of governing the territories . . . annexed or colonized by Germany and the Ottoman Empire" and arguing that "colonialism profoundly shaped the character of international institutions at their formative stage").

90. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. No. 131, ¶ 70 (July 9).

91. Susan Pederson, Settler Colonialism at the Bar of the League of Nations, *in* Settler Colonialism in the Twentieth Century 113, 124–29 (Caroline Elkins and Susan Pederson eds., 2005) (noting that "[o]nly in one instance between the wars did the League and progressive Western international opinion fairly and unambiguously support a settler project; this was the Zionist project in Palestine").

92. Balfour Declaration, supra note 87; see also Justin McCarthy, The Population of Palestine 10 tbl.1.4D (1990) [hereinafter McCarthy, The Population of Palestine].

93. See Noura Erakat, Justice for Some: Law and the Question of Palestine 31 (2019) [hereinafter Erakat, Justice for Some] (quoting Letter from Arthur Balfour, British Foreign Sec'y, to Lloyd George, British Prime Minister (Feb. 19, 1919)). Balfour expanded on the Palestinians' exclusion from the principle of self-determination in a confidential memorandum:

> Our justification for our policy is that we regard Palestine as being absolutely exceptional; that we consider the question of Jews outside Palestine as one of world importance, and that we conceive the Jews to have historic claim to a home in their ancient land; provided that home

The privileging of Zionist interests over the "non-Jewish communities in Palestine" became an explicit, central, and recurring theme codified into the articles of the British Mandate in 1922.[94] Notably, the acquisition of "Palestinian citizenship by Jews" is the only mention of the word "Palestinian" in the entire twenty-eight articles of the Mandate.[95] In effect, the British Mandate served as an incubator for the Zionist settlement project, one that facilitated the creation of a Zionist "state within a state,"[96] all while suppressing the Palestinian population. As revisionist Zionist leader Vladimir Jabotinsky bluntly wrote, "What need, otherwise, of the Balfour Declaration? Or of the Mandate? Their value to us is that an outside Power has undertaken to create in the country such conditions of administration and security that if the native population should desire to hinder our work, they will find it impossible."[97]

A comprehensive survey of the British–Zionist nexus is beyond the purview of this Article, but it is important to note that the endorsement of Zionism by the preeminent imperial power of the time and the displacement of the Jewish Question from Europe has entailed a radical reconfiguration of what the category "Jewish" actually meant within and outside Europe. For Edwin Montagu, the only Jewish person in the British cabinet at the time of the Balfour Declaration, it seemed "inconceivable

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> can be given to them without either dispossessing or oppressing the present inhabitants.

Id. (quoting Letter from Arthur Balfour, British Foreign Sec'y, to Lloyd George, British Prime Minister (Feb. 19, 1919)).

94. See Mandate for Palestine and Memorandum by the British Government Relating to its Application to Transjordan, League of Nations Doc. C.529.M.314.1922.VI (1922) [hereinafter British Mandate]. For example, Article 2 of the British Mandate states that the Mandate "shall be responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home." Id. art. 2. Article 4 further grants the Zionist Organization a special status as a "public body for the purpose of advising and co-operating with the Administration of Palestine." Id. art. 4. This body, the so-called "Jewish agency," was authorized to "assist and take part in the development of the country," which Article 11 instructs may include "any public works, services and utilities, and to develop any of the natural resources of the country." Id. art. 4, 11.

95. See British Mandate, supra note 94. Within the first eight years of the British Mandate, the Jewish population in Palestine increased dramatically from about six percent to over nineteen percent. See Khalidi, From Haven to Conquest, supra note 43, app. I. Article 6 instructed the Palestinian administration to "facilitate Jewish immigration" and encouraged the "close settlement by Jews on the land." British Mandate, supra note 94, art. 6. To further expedite the process of Jewish immigration, Article 7 laid the framework of a nationality law "framed so as to facilitate the acquisition of Palestinian citizenship by Jews who take up their permanent residence in Palestine." Id. art. 7.

96. Barbara J. Smith, The Roots of Separatism in Palestine: British Economic Policy, 1920–1929, at 3 (1993) (internal quotation marks omitted) ("By the end of the 1930s the Zionists in Palestine had formed virtually a 'state within a state' with a military organization and political, social, economic, and financial institutions separate from those of the indigenous population as well as from the British Mandatory Administration.").

97. Vladimir Jabotinsky, The Iron Wall, Jewish Herald (Nov. 26, 1937), https://www.infocenters.co.il/jabo/jabo_multimedia/articlesl/%D7%90%D7%A0%D7%92%D7%9C%D7%99%D7%AA/1923_204.pdf#page=11 [https://perma.cc/9KAC-H5C6].

that Zionism should be officially recognised by the British Government."[98] Like many other Jews who opposed the Zionist premise that Jews did not belong in Europe, Montagu regarded the Balfour Declaration as endorsing antisemitism: "[T]he policy of His Majesty's Government is anti-Semitic in result and will prove a rallying ground for Anti-Semites in every country in the world."[99]

The language of the British also officially bifurcated the "Arab" and "Jew," positioning these two identities as mutually exclusive. At the turn of the century, the Jewish community in Palestine was largely integrated into the local social fabric, which included Muslim, Christian, Jewish, and Druze, among other communities. As historian Rashid Khalidi put it: "In spite of marked religious distinctions between [the Jewish communities in Palestine] and their neighbors, they were not foreigners, nor were they Europeans or settlers: they were, saw themselves, and were seen as Jews who were part of the indigenous Muslim-majority society."[100]

The coexistence of Jews with other communities in Palestine was not an exceptional phenomenon[101] but one that reflected the status of Jews who were also Arabs, or Arabs who were also Jewish, across the Arab and Muslim world until the mid-twentieth century.[102] As Professor Avi Shlaim

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98. Walid Khalidi, Edwin Montagu and Zionism, 1917, *in* Khalidi, From Haven to Conquest, supra note 43, at 144 [hereinafter Khalidi, Edwin Montagu and Zionism] (reprinting Memorandum from Edwin Montagu on the Anti-Semitism of the Present (British) Government to the British Cabinet (Aug. 23, 1917)). The tension between Zionism and broader Jewish interests would become all the more apparent as the Nazi regime came into power. The Zionist leadership not only passively benefited from antisemitism, which provided it with an impetus for Jewish migration to Palestine, but also actively negotiated the Transfer Agreement with the Nazi government, arranging the transfer of 60,000 Jews and $100 million to Palestine in return for halting the anti-Nazi boycott of 1933. See Edwin Black, The Transfer Agreement: The Dramatic Zionist Rescue of Jews From the Third Reich to Jewish Palestine, at ix (2009).

99. Khalidi, Edwin Montagu and Zionism, supra note 98, at 143.

100. See Khalidi, Hundred Years' War, supra note 35, at 23. The waves of Jewish immigration before World War II did not substantially alter Palestine's demographic composition. By the start of the war, Palestine was home to about 60,000 Jews in a country of over 700,000 Muslims and Christians. See McCarthy, The Population of Palestine, supra note 92, at 35 tbl.2.15 (showing that World War II did not substantially change Palestine's demographics).

101. Considerable scholarship shows that Arab-Jews were highly integrated in Palestinian society around the turn of the century and that tensions increased with the materialization of Zionist aspirations in Palestine. See, e.g., Menachem Klein, Lives in Common: Arabs and Jews in Jerusalem, Jaffa, and Hebron 19 (2014) (discussing the history of Jewish and Arab communities in Jaffa, Hebron, and Jerusalem); Zachary Lockman, Comrades and Enemies: Arab and Jewish Workers in Palestine, 1906–1948, at 45–47 (1996) (reviewing the history of Palestine during the late Ottoman period and the subsequent British rule); Gershon Shafir, Land, Labor and the Origins of the Israeli-Palestinian Conflict 1882–1914, at 199–202 (1996) (discussing the impact of European Jewish migration into Palestine) [hereinafter Shafir, Origins of the Israeli-Palestinian Conflict].

102. See Avi Shlaim, Three Worlds: Memoirs of an Arab-Jew 13 (2023) [hereinafter Shlaim, Three Worlds] ("Unlike Europe, the Middle East did not have a 'Jewish Question' – antisemitism was a European malady that later infected the Near East. Antisemitic

recounts in his memoir, "We were Arab-Jews. We lived in Baghdad and we were well-integrated into Iraqi society."[103] Shlaim narrates the history of his Jewish Iraqi community as it was torn apart by "the combined pressures of Arab and Jewish nationalism" and "conscripted into the Zionist project."[104] In a rich account, Shlaim details the involvement of the Zionist movement in at least three out of five bombing incidents that targeted the Jewish Iraqi community and catalyzed its mass emigration to Israel between March 1950 and June 1951.[105] Shlaim concludes that "Zionism not only turned the Palestinians into refugees; it turned the Jews of the East into strangers in their own land."[106]

The materialization of Zionism in Palestine has gradually rendered the identity of the Arab-Jew practically impossible.[107] The drastic, and often violent, transformation of Arab-Jewish existence from reality to impossibility would intensify and culminate in the aftermath of the 1948 Nakba, profoundly reconfiguring the identities of Arabs, Jews, and Arab-Jews into contrarian categories of Arabs versus Jews.[108] The identity of Jews in

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literature had to be translated from European languages because there was so little of it in Arabic."). Some scholars have contested this view. Historian Mark R. Cohen, for example, argues that

> [t]he interfaith utopia was to a certain extent a myth; it ignored, or left unmentioned, the legal inferiority of the Jews and periodic outbursts of violence. Yet, when compared to the gloomier history of Jews in the medieval Ashkenazic world of Northern Europe and late medieval Spain, and the far more frequent and severe persecution in those regions, it contained a very large kernel of truth.

Mark R. Cohen, Prologue: The "Golden Age" of Jewish–Muslim Relations: Myth and Reality, *in* A History of Jewish–Muslim Relations 28, 28 (Jane Marie Todd & Michael B. Smith trans., Princeton Univ. Press 2013).

103. Shlaim, Three Worlds, supra note 102, at 8. Shlaim makes a point similar to Khalidi's, noting that his family were "Iraqis whose religion happened to be Jewish and as such . . . were a minority, like the Yazidis, Chaldean Catholics, Assyrians, Armenians, Circassians, Turkomans and other Iraqi minorities. Relations between these diverse communities before the age of nationalism . . . were better characterised as a dialogue rather than a 'clash of civilisations'." Id.

104. Id. at 7, 10.

105. See id. at 125–51. Shlaim notes that "[t]he person who was responsible for three of the bombs was Yusef Ibrahim Basri, a 28-year-old Baghdadi Jew, a lawyer by profession, a socialist, an ardent Jewish nationalist and a member of Hashura, the military wing of Hatenua, the Movement [a Zionist organization]." Id. at 131.

106. Id. at 296.

107. See Ella Shohat, On the Arab-Jew, Palestine, and Other Displacements: Selected Writings 6 (2017) ("The reconceptualization of Jewishness as a national identity had profound implications for Arab Jews. . . . The meaning of the phrase 'Arab-Jew' was transformed from being a taken-for-granted marker of religious (Jewish) and cultural (Arab) affiliation into a vexed question mark within competing nationalisms . . . .").

108. See Yehouda Shenhav, The Arab Jews: A Postcolonial Reading of Nationalism, Religion, and Ethnicity 7–13 (2006) (describing the evolution of Arab-Jewish identity); Shlaim, Three Worlds, supra note 102, at 5 ("If I had to identify one key factor that shaped my early relationship to Israeli society, it would be an inferiority complex. I was an Iraqi boy in a land of Europeans."); Shohat, supra note 107, at 2 ("[T]he conceptual schism between

Europe, especially in Germany, had already undergone a similarly reductive transformation that rejected "the Jewish-German symbiosis."[109] The rise of Nazism to power and its culmination in the Holocaust contributed to the creation of an exclusivist and ethnonationalist Jewish identity among European Jewry, ultimately popularizing the political project of Zionism.[110]

Seen against this background, it becomes clear that Europe never resolved its "Jewish Question" but rather reconfigured and outsourced it to Palestine in the form of Zionism.[111] Zionism emerged in Europe rather than in Palestine as a reaction to European antisemitism, nationalism, and colonialism at once.[112] The proliferation of antisemitism in Europe popularized Zionism as a solution, which endorsed a project of settler colonization to establish a Jewish nation-state in Palestine. The "Question of Palestine" thus became the global iteration of Europe's

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'the Arab' and 'the Jew,' or alternatively between 'the Muslim' and 'the Jew,' can be traced back to the imperialized Middle East and North Africa."); Lital Levy, Historicizing the Concept of Arab Jews in the "Mashriq," 98 Jewish Q. Rev. 452, 464 (2008) ("Arab Jewish identity today is a statement about its own impossibility, about the unbridgeable gap between the unfulfilled wish or desire embedded in what one calls oneself and the ascriptive identity assigned one by normative or hegemonic social forces.").

109. Omer Bartov, Defining Enemies, Making Victims: Germans, Jews, and the Holocaust, 103 Am. Hist. Rev. 771, 782 (1998).

110. Id. at 807 ("The Zionists . . . presented gentile European society as the greatest danger to Jewish existence and promoted the idea of a Jewish state, applying to it the . . . model of Central European nationalism that had . . . viewed Jews as an alien race but combining it with traditional Jewish attitudes to their non-Jewish environment."); see also Omer Bartov, Mirrors of Destruction: War, Genocide, and Modern Identity 168 (2000) ("[S]ince Zionism was largely predicated on the assumption of an approaching catastrophe for European Jewry long before the rise of Nazism, after the war it tended to present the mass murder of Jews as the final . . . proof of the need for a Jewish national home.").

111. The Biltmore Program, adopted by the World Zionist Organization in 1942 against the backdrop of World War II, provides a clear understanding of this formula:

> The Conference declares that the new world order that will follow victory cannot be established on foundations of peace, justice and equality, unless the problem of Jewish homelessness is finally solved. The Conference urges that the gates of Palestine be opened; that the Jewish Agency be vested with control of immigration into Palestine and with the necessary authority for upbuilding the country, including the development of its unoccupied and uncultivated lands; and that Palestine be established as a Jewish Commonwealth integrated in the structure of the new democratic world.

UN, Declaration Adopted by the Extraordinary Zionist Conference at the Biltmore Hotel of New York City, ¶ 8 (May 11, 1942), https://www.un.org/unispal/document/auto-insert-206268/ [https://perma.cc/2RYK-YDVC].

The transformation of Hannah Arendt and her opposition to Zionism emerged out of the Biltmore Conference. See Hannah Arendt, Zionism Reconsidered, *in* The Jewish Writings 343, 343 (Jerome Kohn & Ron H. Feldman eds., Catherine Temerson & Edna Brocke trans., 2007) (describing the Biltmore Conference as a "turning point in Zionist history; for it mean[t] that the Revisionist program, so long bitterly repudiated, ha[d] proved finally victorious").

112. Edward Said, Permission to Narrate 31 (1984) ("Zionism was a hothouse flower grown from European nationalism, anti-semitism and colonialism . . . .").

"Jewish Question" as projected onto Palestine in the twentieth and twenty-first centuries.[113]

B. *Colonialism and Expulsion in Zionist Thought*

As the previous section showed, the colonial origins of Zionism were omnipresent in Herzl's vision of Palestine.[114] While Herzl's quest for a "colonization charter" may have passed from the acceptable vocabulary of our time, the notion of Israel as "an outpost of civilization as opposed to barbarism" still echoes in the words of countless politicians, scholars, and others today.[115] These conceptions are rooted in the articulations of

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113. See generally Said, The Question of Palestine, supra note 67, at 43 (providing an overview of the "Palestinian experience" as characterized by its "traumatic national encounter with [overseas] Zionism").

114. In a letter to Cecil Rhodes, Herzl wrote:

> You are being invited to help make history. That cannot frighten you, nor will you laugh at it. It is not in your accustomed line; it doesn't involve Africa, but a piece of Asia Minor, not Englishmen, but Jews.
>
> But had this been on your path, you would have done it yourself by now.
>
> How, then, do I happen to turn to you, since this is an out-of-the way matter for you? How indeed? Because it is something colonial, and because it presupposes understanding of a development which will take twenty or thirty years.

Letter from Theodor Herzl to Cecil Rhodes, translated in 3, Herzl, Complete Diaries, supra note 73, at 1194.

115. Herzl, The Jewish State, supra note 65, at 96. For recent examples that employ such colonial language, see, e.g., Alan Dershowitz, War Against the Jews: How to End Hamas Barbarism 19 (2023) ("Israel is fighting a war not only for its own survival, but for the victory of humanity over barbarity."); Thomas L. Friedman, Opinion, Understanding the Middle East Through the Animal Kingdom, N.Y. Times: The Point (Feb. 2, 2024), https://www.nytimes.com/live/2024/01/30/opinion/thepoint#friedman-middle-east-animals (on file with the *Columbia Law Review*) ("Sometimes I contemplate the Middle East by watching CNN. Other times, I prefer Animal Planet."); Benjamin Netanyahu, Opinion, The Battle of Civilization, Wall St. J. (Oct. 30, 2023), https://www.wsj.com/articles/the-battle-of-civilization-in-gaza-israel-hamas-3236b023 (on file with the *Columbia Law Review*) ("The horrors that Hamas perpetrated on Oct. 7 remind us that we won't realize the promise of a better future unless we, the civilized world, are willing to fight the barbarians."). This thread, however, is not new or exclusive to right-wing Zionism. In 1996, then–Israeli Prime Minister Ehud Barak announced: "We still live in a modern and prosperous villa in the middle of the jungle, a place where different laws prevail. No hope for those who cannot defend themselves and no mercy for the weak." Lazar Berman, After Walling Itself In, Israel Learns to Hazard the Jungle Beyond, Times Isr. (Mar. 8, 2021), https://www.timesofisrael.com/after-walling-itself-in-israel-learns-to-hazard-the-jungle-beyond/ [https://perma.cc/A5E6-P5SS]. Such discourse positions Zionist settlers as modern civilizers and native Arabs, conversely, as backward and uncivilized.

For more about these colonial dichotomies as reflected in the Zionist project's attitude toward the land and landscape, see Irus Braverman, Planted Flags: Trees, Land, and Law in Israel/Palestine 1–3 (2009) (examining how these colonial dichotomies are "reflected, mediated, and, above all, reinforced through the polarization of the natural landscape into two juxtaposed treescapes"—pine forests and olive groves); Irus Braverman, Settling Nature: The Conservation Regime in Palestine–Israel 2–3 (2023) (examining how Israel's "nature

Zionism as colonialism by its leading thinkers, an ideological infrastructure that would later generate the 1948 Nakba.

Zionism's national aspirations went hand in hand with colonial methods. In line with other colonial enterprises, Herzl proposed a "Jewish Company" that "might be called a Jewish Chartered Company, though it cannot exercise sovereign power, and has other than purely colonial tasks."[116] In 1897, only a year after the publication of Herzl's influential pamphlet, the First Zionist Congress convened in Basel and adopted the Basel Program declaring that "Zionism aims at establishing for the Jewish people a publicly and legally assured home in Palestine."[117] In 1899, the Second Zionist Congress established the Jewish Colonial Trust, modeled after Herzl's "Jewish Company."[118]

Colonization was still a fashionable phenomenon at the end of the nineteenth century, and Zionism demanded an equal share in the European "right" to colonize.[119] The self-evident colonial essence of

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administration" in the form of national park designation and protection of flora and fauna "advances the Zionist project of Jewish settlement alongside the corresponding dispossession of non-Jews from this space"); Gary Fields, Enclosure: Palestinian Landscapes in a Historical Mirror 19 (2017) (exploring how Israel has used enclosure to "forcibly transfer[] Palestinians from areas of present-day Israel to outlying foreign territories or into the West Bank and Gaza Strip, where they assume[] a new social status as refugees"); Zerubavel, supra note 41, at 2 (using the desert as a symbolic landscape to explore "the ways in which Zionist Jews perceived, conceived, encoded, and reshaped the land they considered their ancient homeland").

116. Herzl, The Jewish State, supra note 65, at 98.

117. See 1897: The First Zionist Congress Takes Place in Basel, Switzerland, Isr. Ministry of Foreign Affs., https://mfa.gov.il/Jubilee-years/Pages/1897-The-First-Zionist-Congress-takes-place-in-Basel,-Switzerland.aspx [https://perma.cc/BJK7-FGKP] (last visited Mar. 30, 2024) (internal quotation marks omitted). Note that from the outset, Zionism's aims have been framed in legal terms, as evidenced by the phrase "publicly and *legally* assured home in Palestine." Id. (emphasis added).

118. Zionism: Jewish Colonial Trust, Jewish Virtual Libr., https://www.jewishvirtuallibrary.org/jewish-colonial-trust [https://perma.cc/J9CQ-S4QM] (last visited Mar. 30, 2024). That same year, the *New York Times* reported on the "Conference of Zionists" in Baltimore that "Will Colonize Palestine." Conference of Zionists, N.Y. Times (June 19, 1899), https://www.nytimes.com/1899/06/20/archives/conference-of-zionists-elect-delegates-at-their-meeting-in.html (on file with the *Columbia Law Review*).

119. On the development and demise of the right to colonial conquest in international law, see Sharon Korman, The Right of Conquest 41–66 (1996). Lawyer Sharon Korman provides an uncritical account of the legal history of conquest. Korman's failure to draw any critical insights with regard to conquest becomes clear in her discussion of Israel, in which she skips the question of conquest regarding the 1948 Nakba altogether, simply asserting that "the problem of the future of Palestine was settled by armed force." Id. at 251. Korman continues to examine Israel's annexation of East Jerusalem, guided by the misleading assertion that "Israel's status in East Jerusalem is slightly less problematic than it is in the West Bank." Id. at 253. In this sense, Korman's study provides a useful example of epistemological inquiries informed by Nakba denialism. See supra note 21 and accompanying text. Previous attempts to justify Israel's conquest during the 1948 Nakba have similarly relied on now irrefutably incorrect facts. See, e.g., Stephen M. Schwebel, What Weight to Conquest?, 64 Am. J. Int'l L. 344, 346–47 (1970) (arguing that Israel's conquest in 1948 was justified because Israel was "acting defensively"). But cf. Victor Kattan, From

Zionism did not preclude it from serving simultaneously as a national movement claiming to represent the Jewish people,[120] one that capitalized on a powerful biblical narrative to generate a secularized nation-state.[121] Indeed, the words "Jewish" and "colonial" simultaneously defined major Zionist institutions such as the Jewish Colonial Trust, the Jewish Colonization Association, and ultimately the Palestine Jewish Colonization Association established as late as 1924.[122] Once understood as both a national and colonial movement at once, it becomes easier to understand that these facets of Zionism are not mutually exclusive but rather co-constitutive.[123]

Zionism treated Palestine's native population as disposable. Settler-colonial articulations of Zionism are ubiquitous among Zionist leaders of the twentieth century, who grappled with early iterations of the "Question of Palestine" or the then-called "Arab Question": namely, the fate of the native Arab Palestinian population in the wake of a Jewish state.[124] Israel

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Coexistence to Conquest: International Law and the Origins of the Arab–Israeli Conflict, 1891–1949, at 174–77 (2009) (rebutting Schwebel's and others' arguments that Israel's 1948 conquests were legitimate, including the premise that Israel acted defensively); infra notes 378–379 and accompanying text.

120. Edward Said, Zionism From the Standpoint of Its Victims, Soc. Text, Winter 1979, at 7, 7–10 [hereinafter Said, Zionism].

121. See Amnon Raz-Krakotzkin, Religion and Nationalism in the Jewish and Zionist Context, *in* When Politics Are Sacralized 33, 38 (Nadim N. Rouhana & Nadera Shalhoub-Kevorkian eds., 2021) (describing how "[s]ecularization in Zionism meant the nationalization of religious-messianic conceptions, not their replacement" whereas paradoxically "God does not exist, but he promised us the Land"); Nadim Rouhana, Religious Claims and Nationalism in Zionism, *in* When Politics Are Sacralized, supra, at 54, 65 ("The essence of Zionism as envisioned by its secular founders was to transform the cultural connection – zeroing in on the religious component – into political entitlement, that is, the Zionists' exclusive right of sovereignty over Palestine.").

122. See Theodore Norman, An Outstretched Arm: A History of the Jewish Colonization Association 153 (1985) (Palestine Jewish Colonization Association); Jewish Colonization Association (ICA), Jewish Virtual Libr., https://www.jewishvirtuallibrary.org/jewish-colonization-association-ica [https://perma.cc/MS59-5873] (last visited Mar. 30, 2024) (Jewish Colonization Association); Zionism: Jewish Colonial Trust, Jewish Virtual Libr., https://www.jewishvirtuallibrary.org/jewish-colonial-trust [https://perma.cc/7XK6-2N72] (last visited Apr. 11, 2024) (Jewish Colonial Trust).

123. Nadia Abu El-Haj has powerfully demonstrated how archeology has served the Israeli national-colonial project by "producing facts through which historical-national claims, territorial transformations, heritage objects, and historicities 'happen'." Nadia Abu El-Haj, Facts on the Ground: Archeological Practice and Territorial Self-Fashioning in Israeli Society 6 (2001) (quoting Rogers Brubaker, Nationalism Reframed: Nationhood and the National Question in the New Europe 19 (1996)). Abu El-Haj explained that "[r]ather than analytically arguing for Zionism's colonial *or* national dimensions or, as is also common in scholarship on Israeli society, effacing the colonial question altogether, [she] insist[ed] on the articulation of the colonial *and* national projects" because "[n]ation and empire were always and everywhere co-constituted." Id. at 4–5.

124. See generally Neil Caplan, Palestine Jewry and the Arab Question 1917–1925, at 3 (1978) (characterizing the Arab question as the Zionist concern about the "serious demographic, political and/or physical threats posed by the Arabs," and identifying these concerns as varying in priority and intensity); Bashir Bashir & Leila Farsakh, Introduction:

Zangwill, an early Zionist figure, posed this question after realizing that Palestine was already inhabited: "One of the two: a different place must be found either for the Jews or for their neighbours [the Palestinians]."[125]

Clearly, the Zionist movement adopted the latter approach. Making room for a Jewish state in Palestine was understood by most schools of Zionism to require an exclusive Jewish majority in the future territory of the Jewish state.[126] Put simply, Zionism worked to implement the notion of "maximum territory, minimum Arabs."[127] As such, it necessitated in one way or another the mass transfer of Palestinians from the land.[128] Zangwill, for example, at different times suggested an "Arab exodus" that would include "race redistribution," which he contended was "literally the only 'way out' of the difficulty of creating a Jewish State in Palestine."[129] But he also realized that expelling the Palestinian people might be an unviable option and pose an existential threat to Zionism, leading him to establish the Jewish Territorial Organization and advocate for a Jewish state elsewhere.[130]

Three Questions that Make One, *in* The Arab and Jewish Questions: Geographies of Entanglement in Palestine and Beyond 8 (Bashir Bashir & Leila Farsakh eds., 2020) (defining the "Arab question" as "what to do with the existence and resistance of the indigenous Arab population in Palestine to the Zionist project" and criticizing alternative definitions that rendered it about "the relations between Jews and Arabs in the country" (internal quotation marks omitted)).

125. Masalha, Expulsion of the Palestinians, supra note 46, at 10 (internal quotation marks omitted) (quoting Zionist leader Israel Zangwill). As Zangwill also put it,

> Palestine proper has already its inhabitants. The pashalik of Jerusalem is already twice as thickly populated as the United States, having fifty-two souls to the square mile, and not 25 per cent of them Jews; so we must be prepared either to drive out by the sword the tribes in possession as our forefather did, or to grapple with the problem of a large alien population, mostly Mohammedan and accustomed for centuries to despise us.

The East Africa Offer, *in* Speeches, Articles, and Letters of Israel Zangwill 198, 210 (Maurice Simon ed., 1937).

126. Alternative strands of Zionism imagined binational statehood but were entirely marginalized by the dominant Zionist schools of thought. See, e.g., Adi Gordon, Rejecting Partition: The Imported Lessons of Palestine's Binational Zionists, *in* Partitions, supra note 29, at 175–77.

127. Segev, A State at Any Cost, supra note 28, at 407.

128. Especially relevant to the subject of the mass transfer of Palestinians is Nur Masalha's book *Expulsion of the Palestinians: The Concept of "Transfer" in Zionist Political Thought, 1882–1948*, which provides a detailed survey of Zionist political thought and reveals the centrality of the concept of transfer to Zionism. Masalha, Expulsion of the Palestinians, supra note 46.

129. Id. at 13 (quoting Israel Zangwill, The Voice of Jerusalem 103 (1920)). But see Meri-Jane Rochelson, A Jew in the Public Arena: The Career of Israel Zangwill 166 (2008) (arguing that "[w]hile the phrase 'race redistribution' sounds frighteningly Hitlerian, in February 1919 it was part of an idealistic plan to create a world of peace and justice").

130. Meri-Jane Rochelson, supra note 129, at 165 ("[Zangwill] may have been the first Zionist to recognize the difficulties that the Palestinian Arab population would pose, and in the end he could see no way around it but to search for a homeland elsewhere."); see also Gur Alroey, Zionism Without Zion: The Jewish Territorial Organization and Its Conflict With the Zionist Organization 202–53 (2016) (tracing Zangwill's "unremitting efforts" to find a territory that

Unlike Zangwill, leading Zionist thinkers—from Theodor Herzl[131] to Chaim Weizmann[132] to David Ben-Gurion[133]—remained committed to the project of Zionism in Palestine and lucidly articulated colonialism and expulsion as central tenets of their project. But no articulation of Zionism has put it as bluntly as Jabotinsky, the father of revisionism, a school of Zionism that provides the political ideology of Benjamin Netanyahu's Likud party

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would be suitable for the Zionist project, a search which took him to "Africa, Australia, the Americas, and Asia").

131. For Theodor Herzl, Zionism had certainly entailed a process of dispossession and removal of the native population from the land by creating an alliance with a tiny class of native landowners:

> We shall try to spirit the penniless population across the border by procuring employment for it in the transit countries, while denying it any employment in our own country.
>
> The property-owners will come over to our side. Both the process of expropriation and the removal of the poor must be carried out discreetly and circumspectly.

1, Herzl, Complete Diaries, supra note 73, at 88; see also Ghassan Kanafani, The Revolution of 1936–1939 in Palestine: Background, Details, and Analysis 6 (Hazem Jamjoum trans., 2023) (analyzing this unfulfilled alliance and arguing that "[t]he middle Arab landowners and urban bourgeoisie began to feel that Jewish capital was fast encroaching upon their interests").

132. For Chaim Weizmann, the president of the World Zionist Organization and first president of Israel, "the native [Palestinian] population was akin to 'the rocks of Judea, as obstacles that had to be cleared on a difficult path.'" Masalha, Expulsion of the Palestinians, supra note 46, at 17 (quoting Simha Flapan, Zionism and the Palestinians 56 (1979)). When asked about the residents of Palestine, Weizmann said, "The British told us that there are some hundred thousands negroes [Kushim] and for those there is no value." Id. at 6 (alteration in original) (quoting David Ben-Gurion, 1 Yoman Hamilhamah 22 (1982)).

Weizmann further articulated Zionism as colonialism before the UN Special Committee on Palestine as late as 1947:

> All of you will remember the East Indian Charter Company. But charter companies were hard to fashion in 1918, the first quarter of the twentieth century. The Wilsonian conception of the world certainly would not have allowed a charter company. Therefore, we had to create a substitute. This substitute was the Jewish Agency which had the function of a charter company, which had the function of a body which would conduct the *colonization*, immigration, improvement of the land, and do all the work which a government usually does, without really being a government.

U.N. GAOR, 2d Sess., 21st mtg., A/364/Add.2 PV.21 (July 8, 1947), https://www.un.org/unispal/document/auto-insert-183165/ [https://perma.cc/Q6CR-LKHM] (emphasis added).

133. Ben-Gurion endorsed the idea of transfer and stated, "With compulsory transfer we [would] have vast areas [for settlement]. . . . I support compulsory transfer. I do not see anything immoral in it." Masalha, Expulsion of the Palestinians, supra note 46, at 117 (internal quotation marks omitted) (quoting David Ben-Gurion, Protocol of the Jewish Agency Executive Meeting of 12 June 1938, vol. 28, no. 53, Cent. Zionist Archives, Jerusalem). Ben-Gurion would reiterate in 1937 that Israel "must expel Arabs and take their places . . . and if we have to use force—not to dispossess the Arabs of the Negev and Transjordan, but to guarantee our own right to settle in those places—then we have force at our disposal." Id. at 65–66. Tom Segev's biography of Ben-Gurion provides numerous other examples that animate Ben-Gurion's endorsement of transfer. At one instance, for example, Ben-Gurion declared to the Israeli cabinet, "We have decided to help [Etzel] cleanse Ramla." See Segev, A State at Any Cost, supra note 28, at 438.

today.[134] In *The Iron Wall*, Jabotinsky articulates Zionism as settler colonialism, acknowledging that Palestinians would naturally resist Zionist colonization: "The native populations, civilised or uncivilised, have always stubbornly resisted the colonists, irrespective of whether they were civilised or savage."[135] For Jabotinsky, therefore, the only path forward is the use of force: "*Zionist colonisation must either stop, or else proceed regardless of the native population*. Which means that it can proceed and develop only under the protection of a power that is independent of the native population—behind an iron wall, which the native population cannot breach."[136] This idea of an "iron wall," namely, employing violence to assert a Zionist sovereignty against the will of the native Palestinian population, has continued to influence the Israeli doctrine of colonization and state building until this day.[137]

As should be clear from the foregoing,[138] Zionist leaders have always articulated their project as a settler-colonial project involving the transfer

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134. Masalha, Expulsion of the Palestinians, supra note 46, at 10.

135. Jabotinsky, supra note 97 (emphasis omitted).

136. Id.

137. From Moshe Dayan to Benjamin Netanyahu, the idea that Israel must be maintained by force has been a dominant feature of Israeli politics. As early as 1956, Moshe Dayan articulated this doctrine in a famous eulogy for an Israeli soldier named Ro'i Rotberg, who was murdered near Gaza:

> Let us not today fling accusations at the murderers. What cause have we to complain about their fierce hatred for us? For eight years now, they sit in their refugee camps in Gaza, and before their eyes we turn into our homestead the land and villages in which they and their forefathers have lived.
>
> We should demand [Ro'i's] blood not from the Arabs of Gaza but from ourselves. . . . We are a generation of settlers, and without the steel helmet and the gun barrel we will not be able to plant a tree or build a house.

See Avi Shlaim, The Iron Wall: Israel and the Arab World 106–07 (2d ed. 2014) [hereinafter Shlaim, Iron Wall].

Netanyahu encapsulated this doctrine by famously stating in 2015 that Israel would "forever live by the sword." See Barak Ravid, Netanyahu: I Don't Want a Binational State, But We Need to Control All of the Territory for the Foreseeable Future, Haaretz (Oct. 26, 2015), https://www.haaretz.com/israel-news/2015-10-26/ty-article/.premium/netanyahu-i-dont-want-a-binational-state-but-we-need-to-control-all-of-the-territory-for-the-foreseeable-future/0000017f-e67d-da9b-a1ff-ee7f93240000 (on file with the *Columbia Law Review*).

138. Mohammed El Kurd positions the Palestinian subjects themselves as sources of knowledge, contesting the need to cite Zionist articulations to corroborate the Palestinian experience:

> I know I am native to Jerusalem, not because Jabotinsky said so, but because I am. I know that Zionists have colonized Palestine without the need to cite Herzl. I know this because I live it, because the ruins of countless depopulated villages provide the material evidence of calculated ethnic cleansing. When we as Palestinians speak about this ongoing and ignored ethnic cleansing—which is inherent to Zionist ideology, by the way—we are at best passionate and at worst angry and hateful. But in reality, we are just reliable narrators. I say we are reliable

and the expulsion of the native Palestinian population.[139] These concepts have constituted an overarching and organizing logic of Zionist thought, resembling a particular articulation of what historian Patrick Wolfe has called the "logic of elimination."[140]

As Professor Rashid Khalidi shows, Palestinians have realized and contested Zionism's basic tenets from its inception.[141] It is precisely against this background that scholars and others have long characterized Zionism as a form of colonialism and racism.[142] In 1965, Arab Palestinian

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> narrators not because we're Palestinians. It's not on an identitarian basis that we must be given, or must take, the authority to narrate. But history tells us that those who have oppressed, who have monopolized and institutionalized violence, will not tell the truth, let alone hold themselves accountable.

Mohammed El Kurd, The Right to Speak for Ourselves, The Nation (Nov. 27, 2023), https://www.thenation.com/article/world/palestinians-claim-the-right-to-narrate/ (on file with the *Columbia Law Review*).

139. Zionists' unreflective use of "colonization" to describe the Zionist and Israeli projects continued after 1948. E.g., Yaakov Morris, Pioneers From the West: A History of Colonization in Israel by Settlers From English-Speaking Countries (1953). For further studies of Zionism as colonialism, see Ilan Pappé, Zionism as Colonialism: A Comparative View of Diluted Colonialism in Asia and Africa, 107 S. Atl. Q. 611, 612 (2008); Gershon Shafir, Theorizing Zionist Settler Colonialism in Palestine, *in* The Routledge Handbook of the History of Settler Colonialism 339, 339 (Edward Cavanagh & Lorenzo Veracini eds., 2017).

140. Patrick Wolfe, Settler Colonialism and the Elimination of the Native, 8 J. Genocide Rsch. 387, 387 (2006) [hereinafter Wolfe, Elimination of the Native] ("I contend that, though [genocide and the settler-colonial tendency] have converged—which is to say, the settler-colonial logic of elimination has manifested as genocidal—they should be distinguished. Settler colonialism is inherently eliminatory but not invariably genocidal."); see also Patrick Wolfe, Structure and Event: Settler Colonialism, Time, and the Question of Genocide, *in* Empire, Colony, Genocide 102, 102–05 (A. Dirk Moses ed., 2008) [hereinafter Wolfe, Structure and Event] ("The logic of elimination is a primary motivation or agenda of settler colonialism that distinguishes it from other forms of colonialism . . . . [S]ettler colonialism is first and foremost a territorial project, whose priority is replacing natives on their land . . . .").

141. As early as 1899, former mayor of Jerusalem Yusuf Diya al-Din Pasha al-Khalidi noted in his correspondence with Herzl that "Palestine is an integral part of the Ottoman Empire, and more gravely, it is inhabited by others" and asked that "Palestine be left alone." See Khalidi, Hundred Years' War, supra note 35, at 2, 4–5. Palestinians had become increasingly aware of Zionist endeavors, objectives, and goals well before those things culminated in the 1948 Nakba. Palestinian figures such as journalists 'Isa al-'Isa and Najib Nassar, who published two influential newspapers—*Filastin* and *al-Karmil*, respectively—also warned about the perils of Zionism. See Khalidi, Palestinian Identity, supra note 45, at 119–44 (delineating the treatment of Zionism in Arabic press). The organization of the Palestine Arab Congress from 1919 to 1928 also reflects this growing consciousness. See Farsoun, supra note 45, at 85–87.

142. For examples of the first wave of scholarship on the subject, see generally George Jabbour, Settler Colonialism in Southern Africa and the Middle East 7 (1970) (arguing that "there is a pattern of behavior which is identical in its general lines exhibited by those European settlers who have formed political entities in non-European lands . . . recognizable in South Africa, Southern Rhodesia and Israel" and studying these similarities through the lens of "settler colonialism"); Jiryis, supra note 9 (describing the conditions

intellectual Fayez Sayegh argued, "'Jewish nationalism' would thus fulfil itself through the process of colonization, which other European nations had utilized for empire-building. For, Zionism, then, colonization would be the instrument of nation-building, not the by-product of an already-fulfilled nationalism."[143] Based on the understanding of Zionism as a form of colonialism that seeks to "establish a settler-community," Sayegh argued that "Zionist racial identification produces three corollaries: racial self-segregation, racial exclusiveness, and racial supremacy," which he described as "the core of the Zionist ideology."[144] Sayegh's theorization of Zionism eventually led the United Nations General Assembly to adopt Resolution 3379 in 1975, declaring Zionism a "form of racism and racial discrimination."[145] In 1991, however, the United States successfully led the diplomatic efforts to repeal the resolution,[146] after convincing the Palestine Liberation Organization (PLO) to agree with its efforts as part of the "peace process" scheme.[147]

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faced by Palestinians in Israel prior to 1967); Baruch Kimmerling, Zionism and Territory: The Socio-Territorial Dimensions of Zionist Politics 1 (1983) (analyzing the "settler society . . . established by immigrant Jews in Palestine" by examining Zionism and the "territory chosen for colonization"); Maxime Rodinson, Israel: A Colonial-Settler State? (1973) (studying Israel's colonial-settler origins); Fayez A. Sayegh, Zionist Colonialism in Palestine (1965) (explaining characteristics of the colonization of Palestine, including expulsion); Shafir, Origins of the Israeli-Palestinian Conflict, supra note 101 (seeking to explain the social origins of the Israeli–Palestinian conflict); Elia T. Zureik, The Palestinians in Israel: A Study in Internal Colonialism (1979) (studying the sociology of Palestinian Arabs in Israel through the lens of internal colonialism); Jamil Hilal, Imperialism and Settler Colonialism in West Asia: Israel and the Arab Palestinian Struggle, 1 Utafiti J. Arts & Soc. Scis. 51 (1976) (reviewing the origins of Zionism); Said, Zionism, supra note 120, at 67 (studying Zionism as both nationalism and settler colonialism). For examples of more recent scholarship, see generally Abu El-Haj, supra note 123 (analyzing the role and effects of archeology in Israeli narrative and nation-building); Seikaly, Men of Capital, supra note 45 (reviewing capitalist movements in pre-1948 Palestine).

143. Sayegh, supra note 142, at 1–2 (emphasis omitted).

144. Id. at 1, 22 (emphasis omitted).

145. G.A. Res. 3379, ¶ 6 (Nov. 10, 1975).

146. G.A. Res. 46/86 (Dec. 16, 1991). See also Paul Lewis, U.N. Repeals Its '75 Resolution Equating Zionism With Racism, N.Y. Times, Dec. 17, 1991, at A1 ("For the United States, the heavy vote in favor of repeal was a demonstration of its diplomatic power. After President Bush called for the repeal in . . . a speech to the General Assembly, United States embassies around the world were instructed to put maximum pressure to secure the repeal.").

147. See Noura Erakat, Beyond Discrimination: Apartheid Is a Colonial Project and Zionism Is a Form of Racism, Eur. J. Int'l L.: Talk! (July 5, 2021), https://www.ejiltalk.org/beyond-discrimination-apartheid-is-a-colonial-project-and-zionism-is-a-form-of-racism/ [https://perma.cc/9L3C-ZLRR] [hereinafter Erakat, Beyond Discrimination] ("The Oslo agreements[,] which resulted [from rescinding the Resolution,] are better understood as a model for ghettoized sovereignty undergirding contemporary claims of Israeli apartheid, rather than a roadmap to Palestinian statehood."). For further context, see Noura Erakat, Unfinished Business: Zionism as a Form of Racism and Racial Discrimination (forthcoming) (manuscript at 1), https://www.academia.edu/79821831/Unfinished_Business_Zionism_as_a_Form_of_Racism_and_Racial_Discrimination [https://perma.cc/9L7U-JTTA] ("In 1991, the PLO agreed to rescind the Resolution as a precondition for entering into the Oslo

Against this background, this Article advances an understanding of Zionism as Nakba. Typically, Zionism is recognized primarily as a movement of Jewish self-determination without attending to its key material consequence. The Nakba, which is the material corroboration and culmination of the ideals espoused by Zionism, leaves no room for doubt as to Zionism's key feature. If before 1948 one could still arguably distinguish between Zionism and its commitment to expulsion or consider the tensions between the colonial and national facets of the movement, then after 1948—and certainly since then—this attempt cannot be understood as anything but an excuse for Zionism and an attempt to salvage Zionism from the atrocities it has committed.[148]

To recognize Zionism as Nakba is to take seriously the magnitude and mechanisms of Palestinian displacement as well as to situate that process within its historical context, namely European antisemitism, the destruction of European Jewry, and the supremacist claims made by European Zionists on Palestinian land. The Nakba has emanated from Zionist praxis and provided an irrefutable material instantiation of Zionist ideology that must inform how we define it.[149]

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peace agreement . . . . The US-led bilateral agreement reframed the Palestinian freedom struggle from one against Zionist settler-colonial 'racial elimination' and territorial expansion to a conflict between two warring peoples.").

148. Professor Derek Penslar provides a sophisticated example of the claim that "[p]lacing Zionism within the broad sweep of Western colonialism leaves unexplained many of its key aspects, such as the nature of Zionism's connection with historic Palestine." Penslar, Zionism, supra note 58, at 70. Interestingly, while Penslar notes that "[w]hether Zionism's particularities or its commonalities with other forms of settlement colonialism are more important is largely a function of the observer's disciplinary position and political commitments," he does not disclose to the readers his own viewpoint, given his disciplinary position or political commitments. See id. at 95–96 (describing what he calls "[e]ngaged scholarship"). One is left wondering: Is nuance the enemy of a value judgment? What is the value of nuance if it obfuscates the harms essential to certain ideologies? If Zionism is colonialism—and surely, other things as well—why should we dissect this facet from its other manifestations and exceptionalize it? This broader attempt to sever Zionism from its family name—colonialism—or the need to constantly assert that it has other relatives called "antisemitism" and "nationalism" remains a puzzling issue. The national and colonial facets of Zionism are not contrary but rather co-constitutive. Zionism was born out of their amalgamation.

149. And yet some scholars have claimed, for example, that Zionism remains a just or justifiable ideology despite the intense moral tensions stemming from its treatment of Palestinians. See, e.g., Chaim Gans, A Just Zionism: On the Morality of the Jewish State 5–6 (2008) (defending the justice of Zionism's "defining principles," though acknowledging the "gap between a particular version of Zionist ideology that could be considered just and the situation today"). Benny Morris, a historian who has written extensively about the Nakba, somehow maintains that Zionist forces' expulsions of Palestinians are not "war crimes": "[I]t was necessary to uproot [Palestinians]. There was no choice but to expel that population. . . . It was necessary to cleanse the villages from which [Jewish] convoys and [Jewish] settlements were fired on." Survival of the Fittest (Cont.), Haaretz (Jan. 8, 2004), https://www.haaretz.com/2004-01-08/ty-article/survival-of-the-fittest-cont/0000017f-e86d-da9b-a1ff-ec6fb5000000 (on file with the *Columbia Law Review*) [hereinafter Survival of the Fittest] (internal quotation marks omitted) (quoting Benny Morris).

C. *Zionism in Praxis*

The Nakba of 1948, then, is the material manifestation of Zionism. The May 14, 1948 declaration establishing the State of Israel provides a useful temporal mark to distinguish the two main stages of the Nakba. The first stage, inaugurated by the United Nations' adoption of the Partition Plan,[150] unfolded between November 30, 1947, and May 14, 1948. At this first stage of the Nakba, no neighboring Arab armies intervened, and the British had still not yet completed their full withdrawal from Palestine.[151]

And yet, this first stage yielded catastrophic results for the Palestinians and put in place a pattern of expulsion and displacement. The United Nations' adoption of the Partition Plan sparked a process of intensifying violence between Jews and Arabs in Palestine—violence that increasingly

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Although Morris argued that the Nakba is a justifiable case of ethnic cleansing, he later contended that Israel conducted no ethnic cleansing. Compare Survival of the Fittest, supra (stating that "[t]here are circumstances in history that justify ethnic cleansing" and that the expulsions were "necessary to cleanse the hinterland and cleanse the border areas and cleanse the main roads") (internal quotation marks omitted), with Benny Morris, Opinion, Israel Conducted No Ethnic Cleansing in 1948, Haaretz (Oct. 10, 2016), https://www.haaretz.com/opinion/2016-10-10/ty-article/.premium/israel-conducted-no-ethnic-cleansing-in-1948/0000017f-db91-d3a5-af7f-fbbfa2270000 (on file with the *Columbia Law Review*) ("I don't accept the definition 'ethnic cleansing' for what the Jews in prestate Israel did in 1948."). But see Daniel Blatman, Opinion, Yes, Benny Morris, Israel Did Perpetrate Ethnic Cleansing in 1948, Haaretz (Oct. 14, 2016), https://www.haaretz.com/opinion/2016-10-14/ty-article/.premium/yes-benny-morris-it-was-ethnic-cleansing-in-1948/0000017f-da72-d938-a17f-fe7a4a4f0000 (on file with the *Columbia Law Review*) (noting Morris's shift and arguing that he has "betrayed two key duties of the historian: to be open-minded and recognize the extensive research literature that directly relates to his own areas of research; and not to distort his own previous conclusions due to current political insights").

Similarly, historian Adam Raz, author of *Looting of Arab Property in the War of Independence*—a book on the looting of Palestinian property—still opens his book insisting that Zionism was not an ideology of dispossession. Adam Raz, Bizat Harekhush Ha'rvi Bimilḥemet Ha'tzma'ut [The Looting of Arab Property in the War of Independence] 15 (2020) [hereinafter Raz, Looting of Arab Property] ("The Zionist movement was not from the outset a dispossessory movement. In fact, even after the War of Independence, it should not be seen as such.") (author's translation). For an important review of Raz's book, see Avi-ram Tzoreff, Carpets, Books, and Jewelry: Why Looting Was Central to the Nakba, +972 Mag. (Mar. 24, 2022), https://www.972mag.com/looting-1948-historiography/ [https://perma.cc/R9FU-DXX7].

150. G.A. Res. 181 (II) (Nov. 29, 1947). A comprehensive discussion of the Partition Plan is beyond the capacity of this Article. For studies of the partition of Palestine, including the United Nations Partition Plan, see supra note 29.

151. See infra notes 162–171 and accompanying text. A plethora of works provide exhaustive historical detail on the Palestinian Nakba. In this section, I largely rely on Rashid Khalidi's *The Hundred Years' War on Palestine: A History of Settler Colonialism and Resistance, 1917–2017*; Ilan Pappe's *The Making of the Arab-Israeli Conflict 1947–51*; Avi Shlaim's *The Iron Wall: Israel and The Arab World*; and Victor Kattan's *From Coexistence to Conquest: International Law and the Origins of the Arab-Israeli Conflict, 1981–1949*.

victimized Palestinian Arabs.[152] By then, the Zionists had already developed a strong paramilitary force, benefiting from the advantage and training of the British military.[153] The Zionist military infrastructure included better organized, equipped, and trained forces than the barely prepared Palestinian paramilitary groups, which were substantially smaller and significantly less armed.[154]

These tensions culminated in Plan Dalet, a military offensive waged by the Haganah forces starting in April 1948.[155] The self-described aim of

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152. See Pappé, Arab-Israeli Conflict, supra note 49, at 76–77 (describing the "outbreak of violence" after ratification of the Partition Plan, including the offensive and provocative nature of Jewish violence in Jerusalem on December 25, 1947). In January 1948, Sir Alexander Cadogan, Britain's former representative to the UN, stated, "[T]he Jewish story that the Arabs are the attackers and the Jews the attacked is not tenable." Kattan, supra note 119, at 178 (2009) (quoting UN Palestine Comm'n, First Monthly Progress Rep. to the Sec. Council, ¶ 7(c), U.N. Doc. A/AC.21/7 (1948)). In December 1947, Sir Alan Cunningham, the British High-Commissioner of Palestine, described the nature of this violence: "The initial Arab outbreaks were spontaneous and unorganized and were more demonstrations of displeasure . . . than determined attacks on Jews. The weapons initially employed were sticks and stones and had it not been for Jewish resource to firearms, it is not impossible that . . . little loss of life [would have] been caused." Id. (quoting Michael Palumbo, The Palestinian Catastrophe 35–36 (1987)).

153. Pappé, Arab–Israeli Conflict, supra note 49, at 50 ("The experience of some 27,000 Jewish veterans who had served with the British army and the establishment of commando units (Palmach) in 1941, enabled the political leadership to proceed with its plans in defiance of British and Arab opposition."). As early as November 1947, the main and largest paramilitary group, the Haganah, was restructured as a conscription-based army under Ben-Gurion. Id. at 51; see also Shlaim, Iron Wall, supra note 137, at 32–33 (describing Ben-Gurion's military strategy in April and May of 1948 and noting that "the Haganah thus directly and decisively contributed to the birth of the Palestinian refugee problem").

154. Victor Kattan summarizes the disparity before May 1948 as follows:

> Prior to May 1948, the Haganah was able to field 30,000 front-line troops backed up by 32,000 garrison forces, 15,410 settlement police and the 32,000 men of the Home Guard. The Irgun had 5,000 men and Lehi had approximately 1,000 'freedom fighters'. The Palestinian Arabs, on the other hand, had to rely on the *Jaysh al-Jihad al-Muqaddes*, which was their only indigenous defence force, numbering 5,000 men, which had no modern weapons, few sources of finance, and fought with weapons discarded in earlier wars, mostly rifles. The *Jaysh al-Inqadh*, the so-called 'Arab Liberation Army', numbered between 3,000 and 4,000 men, of whom 1,500 were Palestinian Arab. They were described as being poorly trained both militarily and politically, and lacking the formation necessary for mobilising popular resistance.

Kattan, supra note 119, at 178 (footnotes omitted) (first citing David Gilmour, Dispossessed: The Ordeal of the Palestinians 63 (1982); then citing Rosemary Sayigh, The Palestinians: From Peasants to Revolutionaries 79 (2d ed. 2007)); see also Pappé, Arab-Israeli Conflict, supra note 49, at 52 (describing the "growth of the Jewish military potential").

155. See Kattan, supra note 119, at 9–19 ("On 1 April 1948, the Haganah implemented Operation Nachshon, the first of many such operations undertaken as part of Plan Dalet . . . .").

The Haganah was the largest Zionist paramilitary group under the British Mandate era. Id. at 178. It joined the Irgun and Lehi, two smaller Zionist militias that were officially designated as terrorist, to form the Israeli army known as the Israeli Defense Forces (IDF). See

Plan Dalet was to "gain control" of both the territories allocated by the UN Partition Plan, as well as "areas of Jewish settlement and concentration which were located outside the borders [of the Hebrew state]."[156] The plan detailed the methods by which such conquest would take place and directed the "[d]estruction of villages (setting fire to, blowing up, and planting mines in the debris), especially those population centers which [were] difficult to control continuously" and clarified that "[i]n the event of resistance, the armed force must be wiped out and the population must be expelled outside the borders of the state."[157]

The implementation of Plan Dalet marked the start of a systematic campaign of ethnic cleansing and included various operations that oversaw the bombardment, conquest, and depopulation of major cities, such as Haifa, Jaffa, Safad, Tiberias, and the western part of Jerusalem.[158] During this period, on April 9, 1948, the Zionist paramilitary forces slaughtered over a hundred Palestinians from the village of Deir Yassin in a massacre that would leave an indelible mark on Palestinian collective memory.[159] The news of the Deir Yassin massacre fueled an atmosphere of horror among Palestinians and terrorized families into fleeing Palestine.[160]

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id. at 397–98 (providing glossary definitions of the Haganah, Irgun, and Lehi); Shlaim, Iron Wall, supra note 137, at 35.

156. See Walid Khalidi, Plan Dalet: Master Plan for the Conquest of Palestine, J. Palestine Stud., Autumn 1988, at 4, 24 [hereinafter Khalidi, Plan Dalet] (alteration in original) (translating the text of Plan Dalet). Khalidi cites an IDF publication referring to Plan Dalet's purpose as the "control of the area given to us by the UN in addition to areas occupied by us which were outside these borders and the setting up of forces to counter the possible invasion of Arab armies after May 15." Id. at 16 (emphasis omitted) (internal quotation marks omitted) (quoting Isr. Def. Force, Qravot 5708 (Battles of 1948), at 16 (1955)).

157. Id. at 29 (translating the text of Plan Dalet).

158. See Walid Khalidi, The Fall of Haifa Revisited, J. Palestine Stud., Spring 2008, at 30, 31 [hereinafter Khalidi, Fall of Haifa] ("Plan Dalet . . . which spelled out its guidelines and operational orders in meticulous detail, comprised a core of subsidiary operations for the conquest of given regions or towns . . . ."); Khalidi, Plan Dalet, supra note 156, at 7–18 (describing the objectives of Plan Dalet); see also Pappe, Ethnic Cleansing, supra note 36, at 88 ("Whereas the official Plan Dalet gave the villages the option to surrender, the operational orders did not exempt any village for any reason. With this the blueprint was converted into military order to begin destroying villages.").

159. See Sharif Kana'ana & Nehad Zeitawi, Diyr Yasiyn [Deir Yassin], 4 Silsilah al-Qurá al-Filasṭyniyyah al-Mudamarah [The Destroyed Palestinian Villages Series] 57–60 (1987) (listing the names of 107 Palestinians killed in the Deir Yassin massacre based on survivors' testimonies); Ofer Aderet, Testimonies From the Censored Deir Yassin Massacre: 'They Piled Bodies and Burned Them', Haaretz (July 16, 2017), https://www.haaretz.com/israel-news/2017-07-16/ty-article-magazine/testimonies-from-the-censored-massacre-at-deir-yassin/0000017f-e364-d38f-a57f-e77689930000 [https://perma.cc/QPP3-ZW9L] (describing testimonies of Zionist soldiers from the massacre and noting that "most researchers state that 110 inhabitants of the village, among them women, children and elderly people, were killed there."). The Deir Yassin massacre is perhaps the most discussed tragedy but is certainly not an exception. For more on the massacres of the 1948 Nakba, see infra note 169.

160. See Khalidi, Hundred Years' War, supra note 35, at 74–75.

By mid-May of 1948, some 300,000 Palestinians had already been displaced by Zionist forces.[161]

The second stage of the Nakba followed. On May 14, 1948, as the British Mandate officially came to its end, the Zionist leadership declared the independence of the State of Israel, relying on United Nations Resolution 181(II) as an "irrevocable" right to establish Jewish statehood while defying the Resolution's delineated borders.[162] The next day, a war with Arab countries commenced, lasting until the first truce on June 11, 1948.[163] But contrary to the Zionist account of a tiny Israel unexpectedly defeating various Arab countries who came to invade it,[164] in reality, the Israeli army both "outnumbered and outgunned its opponents."[165]

Over the course of a few months, the well-equipped and well-organized military force of the newly established State of Israel crushed the weak and uncoordinated Arab armies[166] while concurrently expanding the conquest of Palestine and forcibly expelling entire Palestinian communities along the way.[167] During this second stage of the Nakba,

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161. Id. at 75.

162. See Declaration of Israel's Independence ¶ 9 (Isr. 1948) ("This recognition by the United Nations of the right of the Jewish people to establish their State is irrevocable.").

163. See Khalidi, Hundred Years' War, supra note 35, at 75. Shlaim, Iron Wall, supra note 137, at 35 ("The first round lasted from 15 May until 11 June, the second from 9 to 18 July, and the third from 15 October until 7 January 1949.").

164. Shlaim, Iron Wall, supra note 137, at 35–36 (depicting the "conventional Zionist version" which "portrays the 1948 war as a simple, bipolar, no-holds-barred struggle between a monolithic Arab adversary and a tiny Israel" wherein "the infant Jewish state fought a desperate, heroic, and ultimately successful battle for survival against overwhelming odds").

165. Khalidi, Hundred Years' War, supra note 35, at 77. Similarly, Shlaim notes:

> [I]n mid-May 1948 the total number of Arab troops, both regular and irregular, operating in the Palestine theater was under 25,000, whereas the IDF fielded over 35,000 troops. By mid-July the IDF mobilized 65,000 men under arms, and by December its numbers had reached a peak of 96,441. The Arab states also reinforced their armies, but they could not match this rate of increase. . . . [A]t each stage of the war, the IDF significantly outnumbered all the Arab forces arrayed against it, and by the final stage of the war its superiority ratio was nearly two to one. The final outcome of the war was therefore not a miracle but a reflection of the underlying Arab-Israeli military balance.

Shlaim, Iron Wall, supra note 137, at 36–37.

166. See Khalidi, Hundred Years' War, supra note 35, at 75 (describing the defeat of the Arab armies, the displacement of Palestinians, and the destruction of Palestinians' homes and villages). See also infra note 173 and accompanying text (describing the "collusion" that formed between the Kingdom of Jordan, the Zionist leadership, and the British prior to 1948).

167. The expulsion of Palestinian communities from Lydda and Ramla in July 1948, ordered by Ben-Gurion, constituted the largest instance of ethnic cleansing in 1948, whereby over 70,000 Palestinians were expelled from their homes. See Morris, Palestinian Refugee Problem, supra note 3, at 429 (describing Ben-Gurion's order to "[e]xpel them [*garesh otam*]" and Yitzhak Rabin's official directive that "[t]he inhabitants of Lydda must be expelled quickly without attention to age" (second alteration in original) (internal quotation marks omitted) (first quoting David Ben-Gurion; then quoting Yitzhak Rabin's

Israeli forces displaced and dispossessed over 400,000 additional Palestinians[168] while committing various massacres,[169] looting Palestinian property,[170] and in some cases raping Palestinian women.[171]

The Arab defeat in the war was not only a product of inferior military capabilities but also a result of these newly formed regimes' dependency

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official directive)); Reja-e Busailah, The Fall of Lydda, 1948: Impressions and Reminiscences, 3 Arab Stud. Q. 123, 140–41 (1981) ("We were ordered to move eastward . . . . We were striking into the wilderness, robbed, and without a Moses."); Walid Khalidi, Introduction to Spiro Munayyer, The Fall of Lydda, J. Palestine Stud., Summer 1998, at 80, 80–82 (describing the expulsion from Lydda, Ramla, and some twenty-five neighboring villages). See generally Maḥmūd Zaydān, Interview with Ismāʿīl ʿAbd al-Qādir Shammūṭ (Oct. 11, 2003), https://libraries.aub.edu.lb/poha/Record/4522 [https://perma.cc/FS3X-7X9J] (describing childhood in Lydda and the expulsion from it).

168. See Khalidi, Hundred Years' War, supra note 35, at 75.

169. The exclusion of Palestinian sources and oral histories by some historians has obfuscated, downplayed, and underestimated the systemic nature of the massacres committed during the 1948 Nakba. Compare Morris, Palestinian Refugee Problem, supra note 3, at 592 ("Apart from the 20-odd cases of massacre, Jewish troops often randomly killed individual prisoners of war, farm hands in the fields and the occasional villager who had stayed behind."), with Saleh Abdel Jawad, Zionist Massacres: The Creation of the Palestinian Refugee Problem in the 1948 War, *in* Israel and the Palestinian Refugees 59, 61–62, 104–24 (Eyal Benvenisti, Chaim Gans & Sari Hanafi eds., 2007) (documenting sixty-eight massacres of Palestinians by Zionist forces between December 1947 through November 1948 and arguing that when the entire pattern is considered, "it is enough to demonstrate a centralised Zionist/Israeli policy of ethnic cleansing, even without 'smoking gun' documents asserting to such a centralized policy"); see also Manna, Nakba and Survival, supra note 53, at 62, 70–77 (describing massacres in ʿIlabun, Saliha, and other villages that took place during "Operation Hiram" to occupy the Galilee following May 1948 and concluding that "[t]he fact that the army perpetrated fifteen massacres during a single week after occupying the Galilee speaks to the presence of a formal policy"); Adam Raz, Classified Docs Reveal Massacres of Palestinians in '48—and What Israeli Leaders Knew, Haaretz (Dec. 9, 2021), https://www.haaretz.com/israel-news/2021-12-09/ty-article-magazine/.highlight/classified-docs-reveal-deir-yassin-massacIsnt-the-only-one-perpetrated-by-isra/0000017f-e496-d7b2-a77f-e79772340000 (on file with the *Columbia Law Review*) ("Morris recorded 24 massacres during the 1948 war. Today it can be said that the number is higher, standing at several dozen cases. . . . With the exception of . . . Deir Yassin . . . this gloomy slice of history appears to have been repressed and pushed aside from the Israeli public discourse.").

170. See Michael R. Fischbach, Records of Dispossession 1 (2003) (describing Israel's dispossession of Palestinian refugees from property during and after 1948); Manna, Nakba and Survival, supra note 53, at 213 (describing the "systematic pillaging by the government of absentee property and possessions"); see generally Raz, Looting of Arab Property, supra note 150 (describing the looting of Palestinian property from various cities including Tiberias, Haifa, Jerusalem, Jaffa, Acre, Safad, Bisan, Ramla, and Lydda).

171. See Morris, Palestinian Refugee Problem, supra note 3, at 220, 231, 238, 249, 257–258, 592 (mentioning instances of rape by Zionist soldiers in Jaffa, Acre, Deir Yassin, Hunin, Abu Shusha, and Burayr); Frances Hasso, Modernity and Gender in Arab Accounts of the 1948 and 1967 Defeats, 32 Int'l J. Middle E. Stud. 491, 497–98 (2000) (analyzing accounts of rape in Deir Yassin); Isabelle Humphries & Laleh Khalili, Gender of Nakba Memory, *in* Nakba: Palestine, supra note 2, at 207, 211–12 (discussing the rapes in Safsaf and Deir Yassin and observing that "[d]espite the use of rape as an instrument of expulsion, however, direct descriptions of the circumstances of rapes have never been incorporated into narratives of Nakba atrocities, and raped women have rarely—if ever—been named").

on imperial powers.[172] In the case of the Kingdom of Jordan, which had the best-trained Arab army at the time, the Kingdom's interests in expanding its territory, economy, and population after independence collided with its putative interest in an independent Palestinian state.[173]

In the first half of 1949, Israel signed a series of armistice agreements with Egypt, Lebanon, Jordan, and Syria, bringing the war to an official end.[174] The agreements established the so-called Green Line, encircling seventy-seven percent of the territory of Palestine, as Israel's unofficial borders.[175] Soon after, the United Nations admitted Israel as a member state to its organization.[176] Egypt assumed control over the Gaza Strip, whereas Jordan assumed control over the West Bank and East Jerusalem.[177] These territories, known today as the Palestinian Territories, would later be occupied by Israel in 1967 following another war between Israel and neighboring Arab states.[178]

By the time the 1948 war concluded, a dramatically new reality emerged. The calamitous results of the Zionist conquest of Palestine and the formation of the State of Israel had left Palestinian society decimated and Arab nations defeated. Hundreds of Palestinian villages were depopulated and destroyed.[179] Over 750,000 Palestinians became refugees,

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172. See Khalidi, Hundred Years' War, supra note 35, at 77–78 ("Jordan's Arab Legion and Iraq's forces[] were forbidden by their British allies from breaching the borders of the areas allocated to the Jewish state by partition . . . .").

173. As Avi Shlaim has shown, the Zionist leadership, the Hashemite Kingdom of Jordan, and the British formed a "collusion to frustrate the United Nations partition resolution of 29 November 1947 and to prevent the establishment of a Palestinian Arab state." Shlaim, Collusion, supra note 49, at 1. Shlaim further argues that "in 1947 an explicit agreement was reached between the Hashemites and the Zionists on the carving up of Palestine following the termination of the British mandate, and that this agreement laid the foundation for mutual restraint during 1948 and for continuing collaboration in the aftermath of war." Id.

174. Benny Morris, Israel's Border Wars 1949–1956, at 1 (1993) ("The 1948 war officially ended with the signing in the spring and summer of 1949 of a series of 'general armistice' agreements between Israel and each of its neighbours . . . . But, for all practical purposes, the fighting between Israel and Lebanon, Syria, and Jordan had already ended in the summer of 1948 . . . .").

175. Robert C. Cottrell, The Green Line: The Division of Palestine 2–4 (2005). Note, however, the narratives of Nakba denialism that inform the author, omitting any mention of systematic expulsions of Palestinians. Id. at 4.

176. Growth in United Nations Membership, UN, https://www.un.org/en/about-us/growth-in-un-membership [https://perma.cc/AX68-2NV7] (last visited Apr. 12, 2024) (noting the addition of Israel as a member state in 1949).

177. For a description of the buildup to and aftermath of the 1967 war, see Khalidi, Hundred Years' War, supra note 35, at 96–137; see also Sara Roy, Inst. for Palestine Stud., The Gaza Strip: The Political Economy of De-Development 65 (3d ed. 2016).

178. See supra note 11 and accompanying text.

179. See supra note 3 and accompanying text; Noga Kadman, Erased From Space and Consciousness: Israel and the Depopulated Palestinian Villages of 1948, at 9 (Dimi Reider & Ofer Neiman trans., 2015) ("Some four hundred thousand of the refugees came from several hundred villages that remained in Israeli hands after the war, ravaged and empty.").

dispossessed, and were denied their right to return to their homes—a reality that continues in the present.[180]

In the aftermath of the 1948 Nakba, the Israeli state has not only denied the Palestinian refugees their right of return and demolished their depopulated villages but also committed further mass expulsions.[181] About 160,000 Palestinians managed to remain within the Green Line demarcating the 1949 armistice borders of the Israeli state, becoming second-class Israeli citizens governed by a military rule that lasted until 1966.[182] In 1967, Israel would occupy the West Bank, the Gaza Strip, and

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180. The United Nations acknowledged the Palestinian refugees' right of return as early as 1948. See G.A. Res. 194 (III), ¶ 11 (Dec. 11, 1948) ("[Palestinian] refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date . . . ."). For more on the right of return, see Kathleen Lawand, The Right to Return of Palestinians in International Law, 8 Int'l J. Refugee L. 533, 533–34 (1996); John Quigley, Displaced Palestinians and a Right of Return, 39 Harv. Int'l L.J. 171, 171–72 (1998); Wadie Said, The Obligations of Host Countries to Refugees Under International Law: The Case of Lebanon, *in* Palestinian Refugees: The Right of Return 123, 125 (Naseer Aruri ed., 2001); Rashid Khalidi, Observations on the Right of Return, 21 J. Palestine Stud., Winter 1992, at 29, 29. See also infra notes 317–319 and accompanying text.

181. See Pappe, Ethnic Cleansing, supra note 21, at 220 (describing the depopulation of Umm al-Faraj village in 1953 and the expulsion of Bedouin tribe of al-Hawashli in 1962); Avi Shlaim, Iron Wall, supra note 137, at 75 (describing the "forcible evacuation of the eight hundred inhabitants of two Arab villages" from the Israel–Syria demilitarized zone in March 1951).

Two villages—Iqrit and Kafr Bir'im—have received exceptional attention within this broader pattern of expulsion and exclusion. These villages' exceptional character is partly because, as early as 1951, the Israeli Supreme Court acknowledged the illegality of the villagers' removal. And yet the Israeli government has prevented residents of these villages from returning. See HCJ 64/51 Daoud v. Minister of Defence, 5(2) PD 1117 (1951) (Isr.) (holding that the petitioners may return to reside in the village of Ikrit); Baruch Kimmerling, Sovereignty, Ownership, and "Presence" in the Jewish–Arab Territorial Conflict: The Case of Bir'im and Ikrit, 10 Compar. Pol. Stud. 155, 160 (1977) ("In July 1951, the inhabitants [of Bir'im and Ikrit] appealed to the Supreme Court, which declared that no *legal* barrier existed to their return."); Joseph L. Ryan, Refugees Within Israel: The Case of the Villagers of Kafr Bir'im and Iqrit, J. Palestine Stud., Summer 1973, at 55, 55 ("The inhabitants of these two villages . . . who were dispossessed by the Israeli army in 1948, have been struggling from within Israel for a quarter of a century for the right to return to their homes.").

182. See Robinson, supra note 9, at 48 ("Most, if not all, Knesset deputies knew that military rule was imposed solely on Palestinians and that the permit system [that restricted day-to-day travel] was racially enforced."); Jabareen, Hobbesian Citizenship, supra note 10, at 193–98 ("Only about 160,000 Palestinians remained . . . . [T]hey lost their leaders, elites, cities, and contact with their relatives, friends, the rest of their people, and the Arab nation."); Nadim N. Rouhana & Areej Sabbagh-Khoury, Settler-Colonial Citizenship: Conceptualizing the Relationship Between Israel and Its Palestinian Citizens, 5 Settler Colonial Stud. 205, 207 (2015) ("One of the most prominent features of citizenship, the right to vote and be elected, was granted, as were other social and economic rights. But at the same time, Israel introduced policies that made meaningful citizenship unattainable."); Lana Tatour, Citizenship as Domination: Settler Colonialism and the Making of Palestinian Citizenship in Israel, Arab Stud. J., Fall 2019, at 8, 10 ("[I]n Israel, as in other settler polities, citizenship has figured as an institution of domination, functioning as a mechanism of elimination, a site of subjectivation, and an instrument of race making.").

East Jerusalem, displacing hundreds of thousands more Palestinians and imposing a military occupation that persists until today.[183]

To summarize: the mass expulsion of Palestinians began before the intervention of any Arab states in May 1948, and defined the process of the Nakba, which extended well beyond 1948 and continues to order Palestinian existence to this day. Common descriptions of 1948 as simply a war have thus obfuscated and grossly reduced the full meaning of the Nakba, which has never been merely a result of war but was rather a set of catastrophic transformations imposed by force on Palestine, the Palestinian people, and, indeed, the Arab world more broadly. These transformations, captured through the concept of Nakba, are the result of Zionism in praxis; a national-colonial enterprise that emerged in Europe and contained expulsion in its ideological DNA.

II. NAKBA AND ITS LEGAL OTHERS

The terms "occupation," "apartheid," and "genocide" have often been invoked to describe the Palestinian condition from a legal standpoint. And yet, one need not be a scholar of international law to grasp that the word occupation denotes—or at least should denote—situations that are in essence different from apartheid, and that both terms, in turn, are distinct from genocide. Palestine is a site of conceptual collision and overlap, where existing frameworks are stretched to the verge of collapse. Too often, the legal discourse around Palestine is cacophonous and muddled, not least because the violence that is committed against the Palestinian people is multifaceted.

What is the most sensible legal category to capture the Palestinian condition? This Article proposes that the answer is all of the above and none at once: Palestine is best understood through the prism of Nakba, which may fulfill the legal definitions of occupation, apartheid, and genocide at various points while still transcending their confines. In other words, the terms we possess have failed to capture the reality of Palestine not because they are incorrect but because each term highlights only part of the story. Adopting the Nakba framework as an overarching legal concept insists on contending with the totality of the Palestinian condition, one that is greater than the sum of its parts. It allows us to fine-tune, synthesize, and locate existing terms within a broader context and apply them to specific facets of Palestinian subordination.

As this Part shows, existing legal frameworks are prone to contest the very core of the Palestinian experience rather than recognize it and circumvent legal questions about the Nakba rather than contend with them. This tension is entrenched in the legal history of Palestine, which is characterized by successive attempts to quash the Palestinian right to self-

183. See supra note 177.

determination ever since the inception of the British Mandate.[184] It is against this background that the Palestinian condition must be analyzed and formulated in legal terms. A legal conception of Palestine must account for this obstructed process of decolonization. Once the United Nations adopted the partition scheme and recognized the State of Israel in 1949, it effectively reconfigured Zionism from an institutionalized settler movement into a new juridical category—statehood—that entrenched the denial of Palestinian self-determination.[185] The Nakba framework thus insists on examining the legal questions stemming from this order.

Part III further explores what the imbrication of Nakba in law may look like. But before moving forward, we must consider the limitations of the existing legal concepts. This Part excludes a detailed exploration of the terms ethnic cleansing, colonialism, and settler colonialism. This decision stems from the fact that, at least in a doctrinal sense, these terms are not as well consolidated as the categories of occupation, apartheid, or genocide.[186] As Part III will explore, the concept of Nakba overlaps with

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184. See supra notes 94–97 and accompanying text.

185. Article 4(1) of the United Nations Charter states that "Membership in the United Nations is open to all other *peace-loving states* which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations." U.N. Charter art. 4 ¶ 1 (emphasis added).

In 1948, Article 4(1) notwithstanding, the U.S. Representative to the UN Philip Jessup made the case for the admission of Israel as a UN member state, despite the conquest of territories beyond the boundaries of the Partition Plan. Notably, he argued

> We all know that, historically, many States have begun their existence with their frontiers unsettled. Let me take as one example, my own country, the United States of America. Like the State of Israel in its origin, it had certain territory along the seacoast. It had various indeterminate claims to an extended territory westward. But, in the case of the United States, that land had not even been explored, and no one knew just where the American claims ended and where French and British and Spanish claims began. . . . I maintain that, in the light of history and in the light of the practice and acceptance by other States, the existence of the United States of America was not in question before its final boundaries were determined.

U.N. SCOR, 3d Sess. 383d mtg. at 11, U.N. Doc. S/PV.383 (Dec. 2, 1948).

In 2024, the United States vetoed a widely supported resolution to admit Palestine as a member state of the United Nations. The U.S. Representative to the UN Robert Wood claimed that "We also have long been clear that premature actions here in New York, even with the best intentions, will not achieve statehood for the Palestinian people. . . . [I]t will only come from direct negotiations between the parties." See Robert Wood, Explanation of Vote at a UN Security Council Meeting on Palestinian Membership, U.S. Mission to UN (Apr. 18, 2024), https://usun.usmission.gov/explanation-of-vote-at-a-un-security-council-meeting-on-palestinian-membership/ [https://perma.cc/FC9K-6RT7]; see also infra notes 412–414 and accompanying text.

186. Antony Anghie, Imperialism, Sovereignty, and the Making of International Law 4–5 (2012) ("[M]any international lawyers . . . write as if international law came to the colonies . . . ready for application, as if the colonial project simply entailed assimilating these aberrant societies into an existing, stable, 'Eurocentric' system – as if . . . the doctrines of

settler colonialism and ethnic cleansing while not matching them perfectly. In a nutshell, ethnic cleansing is a central and foundational act of Nakba, but the structure of Nakba cannot be reduced to ethnic cleansing.[187] If ethnic cleansing is too limited, settler colonialism is too broad. Settler colonialism is a relevant concept, but it includes radically different modalities and does not fully capture the variegated structure of Nakba.[188] Furthermore, invoking settler colonialism has reproduced existing divisions about the geographical location of its applicability.[189]

This Article does not articulate the limits of existing frameworks to advocate for relinquishing them. The reality of violence and domination in Palestine does not allow us the luxury of abandoning any tool available to us in the pursuit of justice and emancipation. Each of these frameworks foregrounds a different set of legal questions that are central to the Palestinian condition. And yet, the totality of the Palestinian reality can only be captured through the concept of Nakba, which locates these legal concepts in a broader picture that ultimately makes other, and harder, questions more salient.

A. *Occupation*

The Israeli occupation of Palestine is infamous for being the most prolonged case of military occupation in modern history.[190] And yet, the

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international law solved the problem of difference by preceding it."); William A. Schabas, 'Ethnic Cleansing' and Genocide: Similarities and Distinctions, *in* Minority Governance in and Beyond Europe 39, 42 (Tove H. Malloy & Joseph Marko eds., 2014) [hereinafter Schabas, Ethnic Cleansing] ("'Ethnic cleansing' is probably better described as a popular or journalistic expression, with no recognized legal meaning in a technical sense." (cleaned up)); see also Wolfe, Structure and Event, supra note 140, at 103 (defining colonialism and settler colonialism through examples rather than legal categorization). This is not to say that ethnic cleansing, colonialism, or settler colonialism are not legal concepts prohibited by international law but rather that international law lacks some concrete, codified, and widely accepted legal definition of these terms.

187. See infra notes 381–382 and accompanying text.

188. See infra notes 385–387 and accompanying text.

189. While some invoke settler colonialism to describe the structure of Zionism, others have confined that concept to Israeli policies in the 1967 occupied Palestinian territories. See, e.g., Michael Lynk (Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967), Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, ¶ 38, U.N. Doc. A/73/447 (Oct. 22, 2018) ("[T]he consistent policy of Israel since 1967 has been to secure an overwhelming Israeli Jewish majority in Jerusalem, achieved through settler implantation and demographic gerrymandering."). Conversely, Professor Lorenzo Veracini has argued that "Israeli/Zionist settler colonialism was remarkably successful before 1967, and was largely unsuccessful thereafter," leading to the conclusion that "the 'classic' model of settler colonialism . . . does not apply in the 1967 territories." Lorenzo Veracini, The Other Shift: Settler Colonialism, Israel, and the Occupation, J. Palestine Stud., Winter 2013, at 26, 28–29.

190. Lisa Hajjar, Courting Conflict: The Israeli Military Court System in the West Bank and Gaza 2 (2005) ("Israel's occupation of the West Bank and Gaza is the longest in modern history and has taken on many permanent-looking features . . . .").

legal framework of occupation illustrates the anomalies that stem from a top-down and noncontextual application of the law. International law only recognizes Israeli occupation to the extent that the 1967 occupation of the West Bank, East Jerusalem, and the Gaza Strip is concerned.[191] The premise that the Israeli regime of domination is rooted in the occupation of the 1967 territories shrinks the law's purview and misdiagnoses the core of the problem. Once the lens of occupation is applied, the totality of the Palestinian condition is distorted, and the Nakba is relegated, as if by amnesia, to a legal limbo.[192]

This tension stems from the origins of the legal concept of occupation, which developed distinctly from the concepts of conquest and colonization.[193] Rooted in the material and conceptual transformations in

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191. This is not tantamount to claiming that occupation, as a legal framework, should be extended to apply monolithically to Palestine since 1948. Instead, this Article suggests that we should formulate a legal conception of the Nakba that includes, but is not limited to, the Israeli occupation of the 1967 territories.

192. Israeli legal scholars have produced substantial and influential knowledge on the law of occupation, taking the Israeli occupation of the 1967 Palestinian territories and the jurisprudence produced by the Israeli Supreme Court as a focal case study. See, e.g., Eyal Benvenisti, The International Law of Occupation 239–48 (2d ed. 2012) [hereinafter Benvenisti, International Law of Occupation]; Yoram Dinstein, The International Law of Belligerent Occupation 1–8 (2d ed. 2019); David Kretzmer & Yaël Ronen, The Occupation of Justice 1–26 (2d ed. 2021); Eliav Lieblich & Eyal Benvenisti, Occupation in International Law 76–77 (2022). Many of these works examine the illegality of the Israeli occupation. Yet none seriously examine the legal questions stemming from the Nakba. Even more critical accounts that acknowledge the relevancy of colonialism to Israeli policies stop short of addressing the occupation regime within its broader ecosystem or scrutinizing the legality of the Nakba. See, e.g., Neve Gordon, Israel's Occupation, at xix–xx (2008); Aeyal Gross, The Writing on the Wall: Rethinking the International Law of Occupation 10–16 (2017). Elsewhere, I have argued that this dichotomy is illustrative of the epistemic erasure of the Nakba constitutive of Israeli legal education. See Rabea Eghbariah, Studentim Aravim-Falastinim Befakultot Yisraeliyot Lemishpatim: Kri'aa Bikortit shel Haḥinukh Hamishpati BeYisrael [Arab-Palestinian Students in Israeli Law Schools: A Critical Reading of Legal Education in Israel], 9 Ma'asei Mishpat [Law & Soc. Change] 219, 222–23 (2017) (arguing that "the reliance of [Israeli legal] education on an ideological underpinning that barely challenges the Zionist tenet of a Jewish and democratic state prevents considering Israeli law from an angle that sees the overall regime as an integral part of the problem." (author's translation)); see also Maya Wind, Towers of Ivory and Steel: How Israeli Universities Deny Palestinian Freedom 115–46 (2024) ("The rising interest of Palestinian citizens in their history has been met with growing limits imposed on its study, as well as on events commemorating it.").

193. See Sharon Korman, The Right of Conquest 110–11 (1996) (describing the evolution of the concept of "occupation" following the Napoleonic Wars); Yutaka Arai-Takahashi, Preoccupied With Occupation: Critical Examinations of the Historical Development of the Law of Occupation, 94 Int'l Rev. Red Cross 51, 56 (2012) ("Unlike the notion of conquest, which gave valid sovereign title to conquered territories, occupation was understood as leaving the sovereignty of the ousted government intact."); Eyal Benvenisti, The Origins of the Concept of Belligerent Occupation, 26 Law & Hist. Rev. 621, 621 (2008) ("The contemporary international law of occupation, which regulates the conduct of occupying forces during wartime, was framed over the course of deliberations among European governments during the second half of the nineteenth century."); Nehal Bhuta,

nineteenth-century Europe, the burgeoning law of occupation sought to regulate certain violence that applied between "civilized" nations. The concepts of conquest and colonial occupation as applied by European nations to non-European peoples were thus initially excluded from the doctrine of belligerent occupation.[194]

The rise of self-determination in the twentieth century reconfigured the legal terrain toward a prohibition on conquest and a universalized understanding of the law of occupation as part of International Humanitarian Law (IHL).[195] The denial of a Palestinian right to self-determination and the failure to decolonize Palestine at the end of the British Mandate, however, resulted in a new reality that escaped the existing legal concepts.

Israel's borders have never been officially and fully defined. Despite this, Israel has extended its sovereignty beyond the demarcated borders of the United Nations (UN) Partition Plan. Recognition of Israel as a member of the UN in 1949, however, effectively sidelined most questions pertaining to conquest, occupation, annexation, and secession.[196] The international community's reluctance to fully recognize Israeli sovereignty over so-called West Jerusalem remains a salient exception to this overall tendency to disregard the legal questions stemming from the 1948 Nakba.[197]

The Antinomies of Transformative Occupation, 16 Eur. J. Int'l L. 721, 722 (2005) (discussing the conceptual problems created by applying "[t]he concept of belligerent occupation, born of the nineteenth century intra-European land order" to the U.S. occupation of Iraq).

194. Articles 42 and 43 of the 1907 Hague Regulations set the initial framework of occupation. See Convention Respecting the Laws and Customs of War on Land arts. 42–43, Oct. 18, 1907, 36 Stat. 2277, 2306. The Geneva Conventions, especially the Fourth Geneva Convention, expanded this framework and the protections granted to the civilian populations. In this context, the Hague Regulations define a territory as occupied when "it is actually placed under the authority of the hostile army," Id. at 2306. The law of occupation has developed based on the principles that (1) an occupation is temporary in essence; (2) occupation does not yield sovereignty or title over the occupied territory; and (3) the occupant's powers are limited to the task of managing the territory for the benefit of the occupied people. Benvenisti, International Law of Occupation, supra note 192, at 43–67.

195. See Convention Respecting the Laws and Customs of War on Land, supra note 194. On the universalization of international law, see Antony Anghie, Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law, 40 Harv. Int'l L.J. 1, 1–5 (1999) (contrasting "a universal international law deriving from human reason [that] applied to all peoples" with a "positivist international law [that] distinguished between civilized states and non-civilized states").

196. For a discussion of these legal questions and their placement in the context of Nakba, see infra note 380 and accompanying text.

197. Reflective of this reluctance is the refusal of most states to recognize Jerusalem as the capital of Israel and to relocate their embassies to Jerusalem. The status of Jerusalem thus remains a legally unresolved issue under international law. See, e.g., Antonio Cassese, Legal Considerations on the International Status of Jerusalem, *in* The Human Dimension of International Law: Selected Papers of Antonio Cassese 290 (Antonio Cassese & Salvatore Zappalà eds., 2008); Henry Cattan, The Status of Jerusalem Under International Law and

Between 1948 and 1966, the State of Israel governed the Palestinians who remained in the territories it controlled through a separate military rule that in most practical ways resembled a military occupation.[198] Yet, only once Israel began to extend its control to rule the West Bank, the Gaza Strip, East Jerusalem, the Golan Heights, and the Sinai Peninsula, did the international community start to invoke the notion of military occupation.

UN Security Council Resolution 242, requiring "[w]ithdrawal of Israel armed forces from territories occupied in the recent conflict[,]"[199] centralized the framework of occupation while sidelining the 1948 Nakba and the unresolved legal questions that it produced. The intentionally vague terms of the resolution, however, requiring withdrawal "from territories" rather than from "all territories," allowed Israel, and the United States, to argue that the resolution had simply imposed an obligation to withdraw from *some* territories but not all of them.[200] Then–U.S. Secretary of State Dean Rusk later commented, "We wanted that to be left a little vague and subject to future negotiation because we thought the Israeli border along the West Bank could be 'rationalized'."[201]

Resolution 242 has de facto reformulated the Question of Palestine into a question of occupation within the 1967 territories, envisioning the termination of that occupation through a process of negotiation.[202] These shortcomings of the occupation framework foreground fundamental limits that impair a holistic understanding of the Palestinian reality. Much like the wall that cuts off the West Bank, the application of the occupation framework has entrenched a conceptual wall that separates Israel from the

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United Nations Resolutions, J. Palestine Stud., Spring 1981, at 3, 4. Even after Israel had been admitted as a member state, the United Nations still pursued a "corpus separatum" in Jerusalem. Ben-Gurion declared against this background that "[w]e do not admit for one minute that the United Nations will try to take Jerusalem by force from Israel." See Ben-Gurion, supra note 28. In December 1949, the United Nations still adopted General Assembly Resolution 303, deciding that "Jerusalem should be placed under a permanent international regime." See G.A. Res. 303 (IV), ¶ 1 (Dec. 9, 1949); see also Yaël Ronen, Schrödinger's Occupation: West Jerusalem 1948–1949, 58 Tex. Int'l L.J. 119, 120 (2023) [hereinafter Ronen, Schrödinger's Occupation] (arguing that Israel "acted on the premise that under international law it was bound to apply [the law of occupation in West Jerusalem between 1948 and 1949]," wherein "a military government was established").

198. See Robinson, supra note 9, at 155–56 (referring to "the brutality of the military regime [and] the devastating economic strangulation of Palestinian communities resulting from the confiscation of their lands"); supra note 9.

199. S.C. Res. 242, ¶ 1(i) (Nov. 22, 1967).

200. See Michael Lynk, Conceived in Law: The Legal Foundations of Resolution 242, J. Palestine Stud., Autumn 2007, at 7, 8, 15.

201. Dean Rusk, As I Saw It: A Secretary of State's Memoirs 333 (1991).

202. Henry Cattan, The Palestine Question 109 (Routledge 2022) (1988) ("[T]he enormity of the damage caused and its sequels have overshadowed the Palestine Question itself . . . .").

territories it occupies.[203] Within this framework, the Israeli occupation of the Palestinian territories in 1967 is treated as the inception of the problem rather than its extension.[204]

This formulation of the problem is a map of misreading.[205] Viewing the 1967 occupation in isolation from the Nakba disassociates the (il)legalities of the Nakba from the (il)legalities of the occupation that followed it nineteen years later. Once these twin events are conceptually segregated, the legal assessment of the territory takes center stage, overshadowing both the legal status of the Palestinian *people* and the nature of the Israeli *regime*. Attempting to apprehend Palestine through the occupation framework obfuscates the legal questions of conquest, secession, the status of Jerusalem, and the crimes committed during the 1948 Nakba. This limited framework also marginalizes the Palestinian refugees' right of return, limits the scope of the Palestinian people's right to self-determination, and conceals the continuum of violence that extends across both sides of the so-called Green Line.[206]

The issues of conquest, self-determination, and return nevertheless continue to pose crucial and unresolved legal questions that stem from

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203. Some Israeli jurists have attempted to advance the argument that the law of occupation does not apply to the 1967 territories because they do not belong to any sovereign state. See, e.g., Yehuda Z. Blum, The Missing Reversioner: Reflections on the Status of Judea and Samaria, 3 Isr. L. Rev. 279, 293 (1968) ("It would seem to follow that, in a case like the present where the ousted State never was the legitimate sovereign, those rules of belligerent occupation directed to safeguarding that sovereign's reversionary rights have no application."). Meir Shamgar, often considered the legal architect of the Israeli occupation, continued to argue that the Fourth Geneva Convention does not apply as a matter of law—in his view, Israel applies it voluntarily as a matter of fact. See Meir Shamgar, The Observance of International Law in the Administered Territories, 1 Isr. Y.B. on Hum. Rts. 262, 265–66 (1971); see also Meir Shamgar, Legal Concepts and Problems of the Israeli Military Government: The Initial Stage, *in* Military Government in the Territories Administered by Israel, 1967–1980: The Legal Aspects 1 (Meir Shamgar ed., 1982).

The international community—including the International Court of Justice (ICJ)—has widely rejected this position in favor of the view that the 1967 Palestinian territories are occupied. See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 140, 166–67 (July 9). The ICJ discussion, however, avoids the legal questions stemming from the 1948 Nakba; rather, it provides a brief and vague summary of this period. See id. at 165–66.

204. Nathan Thrall, The Separate Regimes Delusion, London Rev. Books, Jan. 21, 2021, at 3 (contesting the "belief that one can separate the pre-1967 state from the rest of the territory under its control[,]" a belief which maintains a "conceptual wall" between "(good) democratic Israel and its (bad) provisional occupation").

205. I draw the concept of a "map of misreading" from Boaventura De Sousa Santos, Law: A Map of Misreading. Toward a Postmodern Conception of Law, 14 J.L. & Soc'y 279 (1987).

206. See Ralph Wilde, Using the Master's Tools to Dismantle the Master's House: International Law and Palestinian Liberation, Palestine Y.B. Int'l L., 2019–2020, at 3, 7–8, 12 (arguing that the reasons for "downgrading and even bypassing the question of realizing Palestinian self-determination" include "the exclusive focus on occupation law, and the characterization of the situation as an 'occupation'").

legal obligations that date back to the British Mandate system.[207] Centering occupation against this background becomes a choice that relegates these questions to "history" as opposed to "law."[208] In effect, the occupation framework has served to not only shift the focus away from the Palestinian people as the primary subjects of rights—this framework has also elided the fact that, for the past seventy-six years, Israel has effectively and continuously exerted its control over the entire territory of Mandatory Palestine, consolidating a regime of domination that constitutes a "one-state reality."[209]

But even if we overlook this crucial deficiency in the application of the law of occupation, two other limitations arise. First, occupation is not

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207. See Erakat, Justice for Some, supra note 93, at 232 ("We can see, for example, how self-determination is initially cast—during the Mandate era—as a tool facilitating colonial governance and penetration under the veneer of a 'sacred trust of civilization' to usher a state to independence."); Imseis, United Nations and the Question of Palestine, supra note 29, at 256–58 (identifying "British imperial secret treaty-making and diplomacy" during the Mandate of Palestine as resulting "in the international legal disenfranchisement of the indigenous Palestinians in favour of a European settler-colonial movement" and as the source of "Palestine's legal subalternity"); Kattan, supra note 119, at 3–7 ("[I]t was during the 1922–48 mandate, when Britain facilitated the Zionists in their colonial enterprise, through which international law was instrumental, that the seeds of conflict were first sown. . . . So what can international lawyers learn from the turbulent legal history of the British Mandate of Palestine?"); Ralph Wilde, Tears of the Olive Trees: Mandatory Palestine, the UK, and Reparations for Colonialism in International Law, 25 J. Hist. Int'l L. 387, 422 (2023) [hereinafter Wilde, Tears of the Olive Trees] ("[T]he violation of Palestinian self-determination that began with the UK's failure in 1948 (and, as indicated, before in unlawfully proceeding with and maintaining plenary administration in Mandatory Palestine rather than provisionally recognizing statehood) has continued ever since then, right up until today."). For a discussion of other unanswered legal questions see infra note 380 and accompanying text.

208. Professor Hani Sayed highlights the future-driven political consequences of this distinction: "[T]he focus on the legality of the occupation per se is not politically neutral, to the extent that it implicitly incorporates a specific substantive position on the future of the Palestinians and the nature of the political solution to the conflict." Hani Sayed, The Fictions of the "Illegal" Occupation in the West Bank and Gaza, 16 Or. Rev. Int'l L. 79, 83 (2014).

209. Although different scholars trace the emergence of this condition to different time periods, the understanding of the Israeli regime as a "one state reality," spanning from the Jordan River to the Mediterranean Sea, has gained currency. See Michael Barnett, Nathan Brown, Marc Lynch & Shibley Telhami, Israel's One-State Reality: It's Time to Give Up on the Two-State Solution, Foreign Affs. (Apr. 14, 2023), https://www.foreignaffairs.com/middle-east/israel-palestine-one-state-solution (on file with the *Columbia Law Review*) (discussing the imminence of a "one-state reality" under Prime Minister Benjamin Netanyahu's political regime); see generally Ariella Azoulay & Adi Ophir, The One-State Condition: Occupation and Democracy in Israel/Palestine (Tal Haran trans., 2012) (discussing how the construction of the Israeli occupation as a two-state system "creates the illusion that the ruling apparatus in the Occupied Territories is detached and separate from Israel proper—[which] is crucial to the integration of the Occupation into the Israeli state and the transformation of the regime"); Ian S. Lustick, Paradigm Lost: From Two-State Solution to One-State Reality (2019) (describing how "[t]he ghost of the [two-state solution] haunts the conflict and obscures the reality that all of Palestine is controlled by one state, and the name of that state is Israel").

inherently prohibited in international law, and second, the longstanding and protracted Israeli occupation has resulted in divergent legal situations that can hardly be captured through a monolithic framework. While supposedly temporary in nature, the Israeli occupation has now extended well beyond half a century and has included the annexation of East Jerusalem, the fragmentation and ever-increasing settlement of the West Bank, and the prolonged blockade over the Gaza Strip followed by a genocidal war.

The indefinite extension of the ostensibly temporary Israeli occupation—an evident contradiction in terms—has led scholars to argue that Israeli occupation is illegal, full stop, rather than focusing on specific violations that the occupying power commits.[210] The view that the Israeli occupation regime is illegal, as such, has regained currency within the UN in recent years.[211] Its legality has been referred for review to the

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210. See Gross, supra note 192, at 10 ("[T]he law of occupation may offer a way of legitimizing new forms of regimes akin to conquest, colonialism, and apartheid by dressing them up as a legitimate and temporary institution."); Orna Ben-Naftali, Aeyal M. Gross & Keren Michaeli, Illegal Occupation: Framing the Occupied Palestinian Territory, 23 Berkeley J. Int'l L. 551, 555 (2005) (stating that "an occupation that cannot be regarded as temporary defies both the principle of trust and of self-determination," rendering such an occupation illegal per se, which "is the nature of the Israeli occupation of the Occupied Palestinian Territory (OPT)"); see generally Ardi Imseis, Negotiating the Illegal: On the United Nations and the Illegal Occupation of Palestine, 1967–2020, 31 Eur. J. Int'l L. 1055 (2020) [hereinafter Imseis, Negotiating the Illegal]. This thread of scholarship has developed the conceptualization of the temporal aspect of occupation from a "prolonged occupation" framework into an "illegal occupation" framework. See, e.g., Adam Roberts, Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967, 84 Am. J. Int'l L. 44, 99–103 (1990).

211. See Francesca Albanese (Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967), Situation of Human Rights in the Palestinian Territories Occupied Since 1967, ¶ 4, U.N. Doc. A/78/545 (Oct. 20, 2023) (referring to the Israeli occupation as the "illegal colonization of . . . occupied territory"); Michael Lynk (Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967), Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, ¶ 12, U.N. Doc. A/HRC/49/87 (Aug. 12, 2022) [hereinafter Lynk, 2022 Report on the Situation of Human Rights] (noting that "the protracted Israeli occupation has crossed the bright red line into illegality"); Rep. of the Indep. Int'l Comm'n of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, ¶ 65, U.N. Doc. A/78/198 (Sept. 5, 2023); see also Al Jazeera, UN's Navi Pillay: Israel Has 'No Intention of Ending Occupation' (Oct. 28, 2023), https://www.aljazeera.com/program/talk-to-al-jazeera/2023/10/28/un-navi-pillay-israel-has-no-intention-of-ending-occupation [https://perma.cc/LG6T-4HTD] (asserting that "the increasingly militarized law enforcement operations of Israel and repeated attacks by Israel on Gaza are aimed at maintaining its unlawful 56-year occupation"); Vito Todeschini, The (il)Legality of Israel's Prolonged Occupation of the Palestinian Territory: Perspectives From the UN Special Rapporteur and Commission of Inquiry's September 2022 Reports, OpinioJuris (Mar. 7, 2023), https://opiniojuris.org/2023/03/07/the-illegality-of-israels-prolonged-occupation-of-the-palestinian-territory-perspectives-from-the-un-special-rapporteur-and-commission-of-inquirys-september-2022-reports/ [https://perma.cc/RD3V-YFP6] (last updated Mar. 10, 2023).

International Court of Justice (ICJ),[212] to whom over fifty parties have submitted their positions on the matter.[213] While the ICJ advisory opinion is likely to conclude that the occupation has become illegal, the reality of the military occupation will most definitely continue to defy any opinion by the court.[214] As Dr. Nimer Sultany put it, as long as the conditions that enabled this reality to emerge persist, "a change in the legal analysis from 'occupation' to 'unlawful occupation' to 'apartheid' is not going to transform law into a potent force for positive change."[215]

Here lies one more weakness of the occupation framework. As the occupation has continued, Israel has fragmented the occupied territories and implemented differential policies across the West Bank, the Gaza

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In this context, Ardi Imseis has examined the UN's treatment of the legality of the occupation and traced the changing language used to frame the illegality of the occupation since 1967. Imseis argues that given the occupation's illegality, an immediate and unconditional termination of the occupation should follow, rather than conditioning freedom on negotiations. See Imseis, Negotiating the Illegal, supra note 210, at 1056.

212. See G.A. Res. 77/247, Israeli Practices Affecting the Human Rights of the Palestinian People in the Occupied Palestinian Territory, Including East Jerusalem, ¶ 18 (Dec. 30, 2022) (tasking the ICJ with issuing an advisory opinion on two questions related to the legal consequences of Israel's ongoing violation of the Palestinian people's right to self-determination and the effect of Israel's policies and practices on the legal status of the occupation); see also Ata Hindi, The United Nations General Assembly Request to the International Court of Justice for an Advisory Opinion: (Some) Reflections, OpinioJuris (Jan. 20, 2023), https://opiniojuris.org/2023/01/20/the-united-nations-general-assembly-request-to-the-international-court-of-justice-for-an-advisory-opinion-some-reflections/ [https://perma.cc/425P-QEQ9] (discussing the ICJ's task of assessing the "(il)legality" of Israel's occupation of Palestine); Ralph Wilde, The Illegality of the Israeli Occupation of the Palestinian West Bank (Including East Jerusalem) and Gaza: What the International Court of Justice Will Have to Determine in Its Advisory Opinion for the United Nations General Assembly, OpinioJuris (Dec. 23, 2022), https://opiniojuris.org/2022/12/23/the-illegality-of-the-israeli-occupation-of-the-palestinian-west-bank-including-east-jerusalem-and-gaza-what-the-international-court-of-justice-will-have-to-determine-in-its-advisory-opinion-for-th/ [https://perma.cc/BWY2-88AF] (summarizing what it might mean for the ICJ to find the occupation "illegal" under international law).

213. See Legal Consequences Arising From the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem, ICJ, https://www.icj-cij.org/case/186 [https://perma.cc/49UE-T3NB] (last visited Mar. 31, 2024) (listing submissions from various countries).

214. In a written statement submitted to the court, the State of Israel described the request for an advisory opinion from the court as "plainly biased." Legal Consequences Arising From the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem (Request for an Advisory Opinion), Statement of the State of Israel Pursuant to the Court's Order of 3 February 2023 Relating to the Advisory Proceedings Initiated by UN General Assembly Resolution 77/247, at 1, 4 (July 24, 2023), https://www.icj-cij.org/sites/default/files/case-related/186/186-20230724-wri-08-00-en.pdf [https://perma.cc/W67K-EWDX]. Israel contended that bringing the matter before the court risks "fundamentally delegitimizing the established legal framework governing the conflict and any future prospect of negotiations between Israelis and the Palestinians." Id. at 4.

215. Nimer Sultany, The Question of Palestine as a Litmus Test: On Human Rights and Root Causes, Palestine Y.B. Int'l L., 2022, at 3, 32–33 [hereinafter Sultany, The Question of Palestine].

Strip, and occupied Jerusalem, in ways that stratify and classify Palestinians into distinct geo-legal categories.[216] The emergence of the Palestinian Authority after the 1993 Oslo Accords and Hamas's 2006 rise to power in the Gaza Strip has added more layers to the already polylithic structure of occupation.[217] The reality is that today there are distinct modes of domination across these territories that cannot simply be captured by the legal framework of occupation.[218]

Certainly, the occupation discourse has been helpful in centering specific facets of the regime and underscoring the illegality of the Israeli settlements in the territories in question. Acknowledging the limits of this framework, however, may help us place the occupation as merely one layer in the broader concept of Nakba—one that allows us to construct an organic understanding of the Palestinian condition and account for the broader continuum of violence.

B. *Apartheid*

The parallels between Israel and apartheid South Africa are multifarious. The Israel–South Africa apartheid analogy was invoked as early as the 1960s by no other than Hendrik Verwoerd, the "architect of apartheid."[219] In 1961, during his tenure as the South African Prime Minister, Verwoerd remarked in response to an Israeli UN vote cast against South Africa that "[t]he Jews took Israel from the Arabs after the Arabs had lived there for a thousand years," and in light of that, agreed that "Israel, like South Africa, is an apartheid state."[220]

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216. See Sayed, supra note 208, at 92–98 (discussing the translation of policies and settlement strategies between Gaza and the West Bank); see also supra note 16.

217. See Tareq Baconi, Hamas Contained: The Rise and Pacification of Palestinian Resistance 1–29 (2018) (describing the initial development of Hamas); Roy, supra note 177, at 103–10 (describing the influence of the PLO in Gaza).

218. Hani Sayed examines the reality of the occupation and notes:

> [It] involves a multiplicity of formal and informal regimes, spread vertically on many levels of governance. The interaction among these regimes and their effects on shaping space, the lives of their inhabitants, and the distribution of fortunes amongst them can hardly be described or explained through a hermeneutic of the rules of the international law of occupation.

Sayed, supra note 208, at 85. Sayed concludes that "[t]he challenge is ultimately to imagine a legal framework for understanding the situation in the [West Bank and Gaza Strip] that does not link the Palestinian right to self-determination to the law of occupation." Id. at 126. This Article takes on Sayed's challenge to show that the West Bank and Gaza Strip are only two locales in a broader structure of subordination best understood through the legal concept of Nakba, see infra section III.B.

219. See Henry Kenney, Verwoerd: Architect of Apartheid 10 (1980) (labeling Hendrik Verwoerd as the "architect of apartheid" for the significant role he played in engineering apartheid in South Africa).

220. Chris McGreal, Worlds Apart, The Guardian (Feb. 6, 2006), https://www.theguardian.com/world/2006/feb/06/southafrica.israel [https://perma.cc/8DLT-5JGC]; Andrew James Clarno, The Empire's New Walls: Sovereignty, Neo-Liberalism, and

Both Israel and Apartheid South Africa emerged in May 1948, though under vastly different circumstances. While Israel's relations with South Africa in the 1950s and 1960s were marked by fluctuations and occasional tensions,[221] the collaboration between the two regimes reached its peak in the 1970s, as Israel nurtured a close security and strategic alliance with the Apartheid regime.[222] Israeli Minister of Defense Ariel Sharon would remark after a visit to South Africa in 1981: "I am certain that the relationship between us will deepen as we work to ensure the National Defence of both our countries."[223] In the same letter to his South African counterpart, Sharon authorized "General Raphael Eitan, the Chief of General Staff to pay a visit to [South Africa]."[224] Eitan himself would later assert that "Blacks in South Africa want to gain control over the white minority just like Arabs here want to gain control over us. And we too, like the white minority in South Africa, must act to prevent them from taking us over."[225]

The comparisons between Israel and apartheid South Africa have become ubiquitous, often invoked by figures holding divergent positionalities. From the PLO to high-ranking Israeli officials,[226] from South

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the Production of Space in Post-Apartheid South Africa and Post-Oslo Palestine/Israel 66 (2009) (Ph.D. dissertation, University of Michigan) (on file with the *Columbia Law Review*) ("As far back as 1961, South African Prime Minister Hendrik Verwoerd, the 'architect of apartheid,' famously dismissed an Israeli vote against South Africa at the United Nations by insisting that . . . 'Israel, like South Africa is an apartheid state.'" (quoting Premier Lashes Israel, Rand Daily Mail (Nov. 23, 1961))).

221. Rotem Giladi, Negotiating Identity: Israel, Apartheid, and the United Nations, 1949–1952, 132 English Hist. Rev. 1440, 1445 (2017) (internal quotation marks omitted).

222. See Sasha Polakow-Suransky, The Unspoken Alliance 6–8 (2010) (discussing the shared military and economic interests that drove the Israeli–South African relationship in the 1970s).

223. Letter from Ariel Sharon, Minister of Def. of the State of Isr., to Magnus Malan, S. African Def. Minister of the Rep. of S. Afr. (Dec. 7, 1981), https://digitalarchive.wilsoncenter.org/document/letter-israeli-defense-minister-ariel-sharon-south-african-defence-minister-magnus-malan [https://perma.cc/DU77-79M5].

224. Id.

225. Ilan Pappé, Introduction to Israel and South Africa: The Many Faces of Apartheid 1, 1 (Ilan Pappé ed., 2015) [hereinafter Many Faces of Apartheid].

226. For a brief history of the use of the term "apartheid" among Arab and Palestinian leadership dating back to the 1960s, see generally Omar H. Rahman, Apartheid and the Palestine Liberation Movement: Opportunities and Challenges, Middle E. Council on Glob. Affs. (2023), https://mecouncil.org/publication/apartheid-and-the-palestine-liberation-movement-opportunities-and-challenges/ [https://perma.cc/3JR5-YKRQ]. Israeli politicians and top officials who invoked the apartheid analogy include two former prime ministers and a former attorney general. See, e.g., Israel's Former Attorney General Says His Country Is an 'Apartheid Regime', Middle E. Eye (Feb. 11, 2022), https://www.middleeasteye.net/news/israel-apartheid-amnesty-report-attorney-general [https://perma.cc/5RUN-VPSE] (noting former Israeli attorney general Michael Ben-Yair's agreement with the Amnesty International report's assessment that Israel is an apartheid state); Rory McCarthy, Barak: Make Peace With Palestinians or Face Apartheid, The Guardian (Feb. 2, 2010), https://www.theguardian.com/world/2010/feb/03/barak-apartheid-palestine-peace [https://perma.cc/W67G-BNTQ] ("Ehud Barak, Israel's defence minister, last night delivered an unusually blunt warning to his country that a failure to make peace with the

African figures like Verwoerd[227] to anti-Apartheid leaders like Desmond Tutu,[228] and from former U.S. President Jimmy Carter[229] to academic scholars and human rights organizations[230]—use of the term "apartheid" has become a central pillar of the conversation around the Israeli system of domination in Palestine.

Since the 1990s, there has been a notable resurgence in the apartheid analogy, combined with the emergence of the Palestinian Boycott, Divestment, Sanctions (BDS) movement in the early 2000s.[231] Books,[232] articles,[233] and reports[234] have been published on the subject of

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Palestinians would leave either a state with no Jewish majority or an 'apartheid' regime."); Rory McCarthy, Israel Risks Apartheid-Like Struggle if Two-State Solution Fails, Says Olmert, The Guardian (Nov. 30, 2007), https://www.theguardian.com/world/2007/nov/30/israel [https://perma.cc/C7U9-VBUA] (quoting former Israel prime minister Ehud Olmert who compared Israel's potential fate to South Africa if it forced Palestinians to fight for their rights).

227. See supra note 219.

228. See Desmund Tutu, Apartheid in the Holy Land, The Guardian (Apr. 28, 2002), https://www.theguardian.com/world/2002/apr/29/comment [https://perma.cc/E3XX-KB5D].

229. See Jimmy Carter, Palestine: Peace Not Apartheid 215 (2006) (drawing a comparison to South African apartheid in laying out potential paths that Israel could take).

230. See Omar Shakir, Hum. Rts. Watch, A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution 3–4 (2021), https://www.hrw.org/sites/default/files/media_2021/04/israel_palestine0421_web_0.pdf [https://perma.cc/8NFP-7DBY] (discussing how apartheid is used to describe both the trajectory and reality of Palestine); see also infra note 234.

231. See Omar Barghouti, Boycott, Divestment, Sanctions: The Global Struggle for Palestinian Rights 21–22 (2011) (discussing the rise of the BDS movement, facilitated on college campuses by the development of Israeli Apartheid Week in 2005).

232. See, e.g., Uri Davis, Israel: An Apartheid State 26 (1987) ("In the case of Israel, Zionist apartheid is applied under the categories of 'Jew' versus 'non-Jew'."); Oren Ben-Dor, Apartheid and the Question of Origin, *in* Many Faces of Apartheid, supra note 225, at 89 (discussing how Israel escapes the simplicity of the apartheid construction as compared to South Africa); Jon Soske & Sean Jacobs, Introduction to Apartheid Israel 4 (Jon Soske & Sean Jacobs eds., 2015) ("Apartheid South Africa and Israel both originated through a process of conquest and settlement justified largely on the grounds of religion and ethnic nationalism.").

233. See, e.g., John Dugard & John Reynolds, Apartheid, International Law, and the Occupied Palestinian Territory, 24 Eur. J. Int'l L. 867, 871 (2013) (assessing Israel's policies and practices and whether they constitute apartheid as understood in international law); John Quigley, Apartheid Outside Africa: The Case of Israel, 1 Ind. Int'l & Compar. L. Rev. 221, 249–51 (1991).

234. Over the past decade, there have been an increasing number of human rights reports arguing that Israel's occupation constitutes apartheid. See, e.g., Francesca Albanese (Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967), Situation of Human Rights in the Palestinian Territories Occupied Since 1967, ¶ 42, U.N. Doc. A/77/356 (Sept. 21, 2022); Lynk, 2022 Report on the Situation of Human Rights, supra note 213, at ¶ 56; Richard Falk (Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967), Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, ¶ 78, U.N. Doc. A/HRC/25/67 (Jan. 13, 2014); John Dugard (Special Rapporteur on the Situation of Human Rights in the Palestinian Territories

Israeli apartheid. The discourse tying Israel to apartheid has culminated in two reports by international human rights organizations—Amnesty International and Human Rights Watch—which determined that Israel is practicing the crime of apartheid according to international law,[235] marking a "paradigm shift" in the liberal discourse around Israel.[236]

And yet, it is evident that within each invocation of the term "apartheid" lies an entirely different conception about what apartheid means, where it applies, how it manifests, and what its solution is. The umbrella term "apartheid" has encompassed radically different interpretations, which together form a coalition of views best described as an agreement to disagree.[237] This section briefly examines some prominent features of Israeli apartheid and argues that the application of the term to the Palestinian condition allows for an obfuscation of the 1948 Nakba and muzzles Palestinian articulations of their own reality.

This critique is not intended to dismiss the relevance of apartheid to Palestine but rather to lay the ground for situating the overlapping concepts of apartheid and Nakba. The discourse that has developed around apartheid over the years has allowed, although it did not necessitate, the sidelining of crucial questions that stem from the Nakba.

Occupied Since 1967), Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council," ¶ 61, U.N. Doc. A/HRC/4/17 (Jan. 29, 2007); Richard Falk & Virginia Tilley, Econ. & Soc. Comm'n for W. Asia, Israeli Practices Towards the Palestinian People and the Question of Apartheid, at 51, U.N. Doc. E/ESCWA/ECRI/2017/1 (Mar. 15, 2017); B'Tselem, supra note 14. Reports by other UN-associated bodies have similarly analyzed the occupation in terms of apartheid See, e.g., Russell Tribunal on Palestine, Suggested Issue for Consideration by the UN Committee on the Elimination of Racial Discrimination (CERD) in Its Review of Israel's 14th to 16th Periodic Reports to the Committee (2012), https://www2.ohchr.org/english/bodies/cerd/docs/ngos/RussellTribunalOnPalestine_Israel80.pdf [https://perma.cc/ZBU5-XA9A]. And many outside organizations and commentators have also shared in that criticism. See, e.g., Beyond Occupation: Apartheid, Colonialism and International Law in the Occupied Palestinian Territories 227 (Virginia Tilley ed., 2012); Michael Sfard, Yesh Din, The Israeli Occupation of the West Bank and the Crime of Apartheid: Legal Opinion 57 (2020), https://s3-eu-west-1.amazonaws.com/files.yesh-din.org/Apartheid+2020/Apartheid+ENG.pdf [https://perma.cc/JTS6-68J5].

235. See Amnesty Int'l, Israel's Apartheid Against Palestinians: Cruel System of Domination and Crime Against Humanity 266 (2022), https://www.amnesty.org/en/wp-content/uploads/2022/02/MDE1551412022ENGLISH.pdf [https://perma.cc/DV4K-9D9T] [hereinafter Amnesty Int'l, Apartheid Against Palestinians]; Shakir, supra note 230, at 169 ("The severity of the repression carried out in the [Occupied Palestinian Territories] amounts to 'systematic oppression' by one racial group over another, a key component for the crime of apartheid as set out in both the Rome Statute and Apartheid Convention.").

236. Smadar Ben-Natan, The Apartheid Reports: A Paradigm Shift on Israel/Palestine (Part I), OpinioJuris (Apr. 12, 2022), https://opiniojuris.org/2022/04/12/the-apartheid-reports-a-paradigm-shift-on-israel-palestine-part-i/ [https://perma.cc/6RPC-JFHX]; but see Erakat, Beyond Discrimination, supra note 147 (contrasting the intellectual differences between institutional reports on Israel and Palestinian conceptions of Israel).

237. See Erakat, Beyond Discrimination, supra note 147 ("Despite this seeming analytical convergence, there remains significant disagreement among the individuals and organizations who otherwise concur that Israel oversees an apartheid regime.").

It has thus reproduced intense and sharp divisions in the terms used in the conversation rather than resolving and synthesizing them. These divisions manifest on at least three levels: the conceptual understanding of apartheid, apartheid's relation to the legal concepts of colonialism and self-determination, and apartheid's spatiotemporal applicability in Palestine.

Scholars have attempted to elucidate the concept of apartheid by distinguishing between "historical" apartheid and "generic" apartheid.[238] While useful, this analytical distinction has often collapsed. An understanding of Israeli apartheid has inescapably remained an *analogy*, one that is rooted in and confused with the manifestations of apartheid in South Africa.[239] Some have attempted to exploit this analogical trait to claim that the comparison is faulty, often by pointing to the legal status of Palestinian citizens of Israel.[240]

The legal understanding of the term "apartheid," which reflects the generic understanding of the term, has further embedded in it this tension between the universal and the particular. The Apartheid Convention, for example, contributes to the confusion by defining the "crime of apartheid"

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238. See Ran Greenstein, Israel–Palestine and the Apartheid Analogy: Critics, Apologists and Strategic Lessons, *in* Many Faces of Apartheid, supra note 225, at 325, 326 ("We need to distinguish between historical apartheid (the specific system that prevailed in South Africa between 1948 and 1994) and the generic notion of apartheid that stands for an oppressive system which allocates political and social rights in a differentiated manner based on people's origins . . . .").

239. See Raef Zreik & Azar Dakwar, What's in the Apartheid Analogy? Palestine/Israel Refracted, 23 Theory & Event 664, 667, 688–89 (2020) (comparing manifestations of apartheid in Israel and South Africa and arguing that conditions necessary to create apartheid in South Africa "have been relatively absent in Palestine," citing "labor relations, political theology of the dominant group, role and social function of language(s), and geopolitical unit(y)" as some such conditions).

240. For example, French President Emmanuel Macron asked, "How dare we talk about apartheid in a state where Arab citizens are represented in government and positions of leadership and responsibility?" Zvika Klein, France's Macron Comes Out Against Claims of Israeli Apartheid, Jerusalem Post (Feb. 28, 2022), https://www.jpost.com/diaspora/antisemitism/article-698925 [https://perma.cc/N7WG-GTSS] (internal quotation marks omitted) (quoting French Prime Minister Jean Castex reading a speech on behalf of President Macron); see also Richard J. Goldstone, Opinion, Israel and the Apartheid Slander, N.Y. Times (Oct. 31, 2011), https://www.nytimes.com/2011/11/01/opinion/israel-and-the-apartheid-slander.html (on file with the *Columbia Law Review*) ("In Israel, there is no apartheid. . . . Israeli Arabs—20 percent of Israel's population—vote, have political parties and representatives in the Knesset and occupy positions of acclaim, including on its Supreme Court. Arab patients lie alongside Jewish patients in Israeli hospitals, receiving identical treatment."); Eugene Kontorovich, The Apartheid Accusation Against Israel Is Baseless—and Agenda-Driven, Eur. J. Int'l L.: Talk! (July 8, 2021), https://www.ejiltalk.org/the-apartheid-accusation-against-israel-lacks-is-baseless-and-agenda-driven/ [https://perma.cc/C8H5-WGNN] ("[A] fundamental weakness of the [Human Rights Watch] report is its failure to examine what happened in South Africa and analogize to [Israel].").

as one that "shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa."[241]

But even when a distinction between the historical and legal understanding of the term is stabilized, a different division emerges, one that places the analytical approaches to apartheid on a spectrum between a "regime approach" and a "crime approach."[242] Whereas the former examines the overall goals and policies of the regime, the latter focuses on certain manifestations or policies of the regime in a particular spatial and temporal setting.[243] Although these approaches are not mutually exclusive, they have further divided the conceptual understanding of the term and reinforced an implied dispute about the characterization of the problem: Does the crime of apartheid lie in a particular subset of Israeli policies or is it the raison d'être of the Israeli regime?

And yet, even the broader regime approach still manifests major tensions. A substantial point of contention that remains is apartheid's connection to the concept of settler colonialism and more specifically, the political ideology of Zionism. A broad coalition of Palestinian human rights organizations, for example, have emphasized that apartheid should be understood "as a tool to . . . further entrench Zionist settler colonialisation" and have centered the denial of self-determination in their analysis of apartheid.[244] Distinguished Professor Noura Erakat has highlighted in this context the "dominant tradition among Palestinian intellectuals and organizations that have understood Zionism as a settler-colonial project predicated on Palestinian elimination" and has proposed that "Zionism is better understood as a political and intellectual analog of apartheid in order to emphasize that Israel did not *become* a discriminatory regime but is *defined* by such discrimination."[245]

Nonetheless, the reports of Human Rights Watch and Amnesty International reveal the extent to which these interconnections between apartheid, Zionism, and settler colonialism have been largely undermined. Both organizations have sidelined the related legal questions of colonialism and self-determination in their analyses.[246] Human Rights Watch claims in this context that its work is "focused on impartially

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241. International Convention on the Suppression and Punishment of the Crime of Apartheid art. 2, Nov. 30, 1973, 1015 U.N.T.S. 243, 245.

242. Ben-Natan, supra note 236.

243. See id.

244. Rania Muhareb, Elizabeth Rghebi, Pearce Clancy, Joseph Schechla, Nada Awad & Maha Abdallah, Al-Haq, Israeli Apartheid: Tool of Zionist Settler Colonialism 88 (2022), https://www.alhaq.org/publications/20940.html [https://perma.cc/CSW3-CGUC].

245. Erakat, Beyond Discrimination, supra note 147.

246. For a comprehensive study of the limits of these reports, see generally Sultany, Question of Palestine, supra note 215; Tareq Baconi, Israel's Apartheid: A Structure of Colonial Domination Since 1948, 51 J. Palestine Stud., no. 3, 2022, at 44, 44 ("[The reports] limit[] [themselves] . . . from taking a position on Palestinian self-determination and sovereignty, which [they] view[] as political decisions.").

applying the facts to the law, and does not address concepts that are not based in international law, including settler colonialism or Zionism as an ideology."[247] For its part, Amnesty International acknowledges that self-determination is a right rooted in international law, and while it recognizes "the potential validity" of the self-determination frame, "Amnesty International limits its analysis to legal frameworks that explicitly address institutionalized racial discrimination."[248] That is because it "does not take a position on international political or legal arrangements that might be adopted to implement that right [to self-determination]."[249] As Sultany observed, "The omission of self-determination from the apartheid reports is not accidental, but reflects an apolitical posture that inhibits the search for root causes."[250] The contemporary liberal approach to apartheid has thus positioned it as a concept that is separate and distinct from both colonialism and the right to self-determination.

And still, adopting this limited approach that separates apartheid from self-determination does not produce an agreement on fundamental issues. Despite taking a similar analytical approach that decouples apartheid from self-determination, Amnesty International and Human Rights Watch do not agree on crucial questions such as: Where does the system of Israeli apartheid exist in space, and when did it start in time? While Human Rights Watch finds "intent by Israeli authorities to maintain systematic domination by Jewish Israelis over Palestinians" in the entire territory under Israeli control,[251] it concludes that the crime of apartheid is practiced only in the occupied Palestinian territories.[252] In contrast, Amnesty International goes a step further and concludes that the crime of apartheid applies to the entire territory, including to the treatment of Palestinian citizens in Israel.[253]

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247. Clive Baldwin & Emilie Max, Human Rights Watch Responds: Reflections on Apartheid and Persecution in International Law, Eur. J. Int'l L.: Talk! (July 9, 2021), https://www.ejiltalk.org/human-rights-watch-responds-reflections-on-apartheid-and-persecution-in-international-law/ [https://perma.cc/TC67-Y979].

248. Amnesty Int'l, Apartheid Against Palestinians, supra note 235, at 38.

249. Id.; see also Soheir Assad & Rania Muhareb, Dismantle What? Amnesty's Conflicted Messaging on Israeli Apartheid, Inst. for Palestine Stud. (Feb. 15, 2022), https://www.palestine-studies.org/en/node/1652565 [https://perma.cc/EJ74-GC99].

250. Sultany, Question of Palestine, supra note 215, at 18.

251. Shakir, supra note 230, at 78.

252. For a concise critique of this position, see Rania Muhareb, Apartheid, the Green Line, and the Need to Overcome Palestinian Fragmentation, Eur. J. Int'l L.: Talk! (July 7, 2021), https://www.ejiltalk.org/apartheid-the-green-line-and-the-need-to-overcome-palestinian-fragmentation/ [perma.cc/K9R8-MF6K].

253. Amnesty Int'l, Apartheid Against Palestinians, supra note 235, at 62 ("Palestinian citizens of Israel are subject to Israeli civil laws, which . . . nonetheless deny them equal rights with Jewish Israelis (including to political participation) and institutionalize discrimination against them.").

This disagreement is not incidental but rather illustrates the limits of seeing the Palestinian reality through the lens of apartheid[254] rather than examining apartheid through the lens of Nakba. Saying that the apartheid framework is limited does not mean that we should relinquish it as a legal tool of analysis, just as saying that the apartheid framework has obscured the Nakba does not mean that we cannot attempt to recenter the Nakba in our depictions of Israeli apartheid. Nonetheless, the manifestation of the Israeli system of domination has resulted in different "variants" of apartheid, suggesting that the term's ability to capture the entirety of the Palestinian condition has become too convoluted.[255] The best way to resolve these tensions is to recognize Nakba as a legal concept, one that overlaps with apartheid but does not perfectly match the latter concept's original manifestation.[256]

The incoherencies and tensions that the apartheid analysis produces are not limited to the disagreement about the spatiotemporal limits of the regime but also extend to its relationship with the legal framework of military occupation.[257] For instance, despite concluding that Israel is

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254. Some Palestinian scholars have articulated a critique of apartheid that leans toward relinquishing the comparison altogether. See, e.g., Saleh Abd al-Jawad, La Ya Saadah . . . Innhu Laysa Abartheid! [No, Gentlemen . . . It's Not Apartheid!], Al-Akhbar (Nov. 11, 2023), https://al-akhbar.com/Palestine/372884 [https://perma.cc/85DN-EZHD] (arguing that despite the commonalities between Palestine and Apartheid South Africa, there are essential factors that make the analogy unviable, including the demographic composition of society, the role of religion, and the motive of domination being exploitation in South Africa versus expulsion in Palestine).

255. This tension is reflected in the words of many who employed the term. See, e.g., Russell Tribunal on Palestine, supra note 234, at 21 (noting that the Israeli "discriminatory regime manifests in varying intensity and forms against different categories of Palestinians depending on their location"). Former President Jimmy Carter, defending the use of the term "apartheid" to refer to Israel, said:

> Apartheid is a word that is an accurate description of what has been going on in the West Bank, and it's based on the desire or avarice of a minority of Israelis for Palestinian land. It's not based on racism. . . . [Apartheid] is a word that's a very accurate description of the forced separation within the West Bank of Israelis from Palestinians and the total domination and oppression of Palestinians by the dominant Israeli military.

Jimmy Carter Defends 'Peace Not Apartheid', NPR (Jan. 25, 2007), https://www.npr.org/2007/01/25/7004473/jimmy-carter-defends-peace-not-apartheid [https://perma.cc/HDD7-CM2T] (quoting Jimmy Carter); see also Elia Zureik, David Lyon & Yasmeen Abu-Laban, Surveillance and Control in Israel/Palestine 58 (2011) ("While official *de jure* apartheid of the South African variety does not exist in Israel, national apartheid on the latent and informal levels . . . is a characteristic feature of Israeli society." (internal quotation marks omitted) (alteration in original) (quoting Zureik, supra note 128, at 16)).

256. Even though Nakba has not yet been understood as a legal concept, Palestinian human rights organizations have already advocated for grounding the apartheid analysis in the ongoing Nakba. See, e.g., Muhareb et al., supra note 244, at 1 ("Since 1948, Palestinians have endured an ongoing *Nakba* (catastrophe) of . . . domination, foreign occupation, annexation, population transfer, and settler colonisation." (emphasis omitted)).

257. See generally Miles Jackson, Expert Opinion on the Interplay Between the Legal Regime Applicable to Belligerent Occupation and the Prohibition of Apartheid Under

practicing the crime of apartheid, Amnesty International simultaneously reiterates that "Amnesty hasn't taken a position on occupation. [The organization's] focus has been on the Israeli government's obligations, as the occupying power, under international law, but Amnesty has taken no position on the occupation itself."[258] From this, we learn, the demand to end apartheid is not necessarily synonymous with the demand to end occupation. The framework of Nakba thus brings into focus different legal questions than apartheid. If apartheid assumes that the demand for justice is *equality* based on the notion of nonracialism, Nakba poses the question of *liberty* as a core component of self-determination, which necessarily includes the immediate termination of the military occupation.[259] To think of the future as one that dismantles the Israeli modalities of apartheid, we need to first name and recognize the entirety of the Palestinian condition: the Nakba.

C. *Genocide*

In February 1983, an Israeli Commission of Inquiry found that Ariel Sharon, then Israeli Minister of Defense, bore "personal responsibility" for failing to prevent the atrocious massacres committed in Lebanon's Sabra and Shatila refugee camps in September 1982.[260] The Commission further found that other senior Israeli officials, including the Israeli Prime Minister Menachem Begin, were also "indirectly responsible" for the massacres.[261] The report noted that on September 16, the same night the massacre commenced, Sharon's office issued instructions asserting that

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International Law (2021), https://apidiakoniase.cdn.triggerfish.cloud/uploads/sites/2/2021/05/expert-opinion-apartheid-and-occupation.pdf [https://perma.cc/BV2X-M9KY] (considering how the legal frameworks of apartheid and occupation apply to Israel and Palestine).

258. Amnesty International USA (@amnestyusa), Twitter (Feb. 1, 2022), https://twitter.com/amnestyusa/status/1488519451976810499 [https://perma.cc/6MQN-WZY6]; see also Assad & Muhareb, supra note 249 (critiquing Amnesty International's limited position on Israeli apartheid).

259. On the concept of liberty, see generally Isaiah Berlin, Two Concepts of Liberty 41–42 (1958) ("What [oppressed classes or nationalities] want, as often as not, is simply recognition . . . and not to be ruled, educated, guided, with however light a hand, as being not quite fully human, and therefore not quite fully free."); see also Avishai Margalit, Home and Homeland: Isaiah Berlin's Zionism, 57 Dissent 66, 68 (2010) (describing Zionism as a cure for lack of freedom).

260. Final Report of the Israeli Commission of Inquiry Into the Events at the Refugee Camps in Beirut (1983), reprinted in J. Palestine Stud., Spring 1983, at 89, 91–92, 115–16 [hereinafter Kahan Report] (publishing excerpts from the English translation of the report).

261. Id. at 106. The report omits and obfuscates the full picture of Israeli liability for the massacre. For a critique of the report, see Noam Chomsky, Fateful Triangle: The United States, Israel & the Palestinians 397–409 (2d ed., Black Rose Books 1999) (1983).

"[f]or the operation in the [refugee] camps the Phalangists should be sent in."[262]

That night, Lebanese Phalangist militias were allowed into the refugee camps to conduct the massacres as the Israeli military fired flares to illuminate their vision.[263] As historian Seth Anziska further revealed, in a meeting with Morris Draper—the American envoy to the Middle East—Sharon declared, "If you don't want the Lebanese to kill them, we will kill them."[264] By September 18, the Phalangist militias had murdered over 1300 men, women, and children.[265] Three decades later, the Israeli archives would reveal that Sharon had feared being held liable for genocide.[266]

That same month, another important yet much less discussed report concerning Israeli conduct in Lebanon was published.[267] The 282-page report was the product of an unofficial initiative of six esteemed jurists headed by Seán MacBride ("the Commission").[268] The Commission was

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262. Kahan Report, supra note 260, at 93–94 (internal quotation marks omitted) (quoting a document sent by the Defense Minister's office to the director of Military Intelligence's office on September 16, 1982).

263. Seth Anziska, Opinion, A Preventable Massacre, N.Y. Times (Sept. 16, 2012), https://www.nytimes.com/2012/09/17/opinion/a-preventable-massacre.html (on file with the *Columbia Law Review*).

264. Id. (internal quotation marks omitted) (quoting Sharon) ("The verbatim transcripts reveal that the Israelis misled American diplomats . . . . [W]hen the United States was in a position to . . . end[] the atrocities, it failed to do so. As a result, Phalange militiamen were able to murder Palestinian civilians, whom America had pledged to protect just weeks earlier."). For the declassified documents, see Declassified Documents Shed Light on a 1982 Massacre, N.Y. Times (Sept. 16, 2012), https://archive.nytimes.com/www.nytimes.com/interactive/2012/09/16/opinion/20120916_lebanondoc.html (on file with the *Columbia Law Review*); see also Seth Anziska, Sabra and Shatila: New Revelations, N.Y. Rev. (Sept. 17, 2018), https://www.nybooks.com/online/2018/09/17/sabra-and-shatila-new-revelations/ (on file with the *Columbia Law Review*) (describing the documents and how they were discovered).

265. Bayan Nuwayhed al-Hout, Sabra and Shatila: September 1982, at 276 (2004).

266. Ofer Aderet, A'hry Sabra Veshatila: Sharon Ḥashash Sheyu'sham Beretzaḥ A'm [After Sabra and Shatila: Sharon Feared Genocide Accusations], Haaretz (Feb. 21, 2013), https://www.haaretz.co.il/news/politics/2013-02-21/ty-article/0000017f-dbcd-d856-a37f-ffcd75d50000 [https://perma.cc/4FVD-KYTC]; see also Ofer Aderet, What Historical Mossad Files Reveal About 'Israel's Most Planned War', Haaretz (Sept. 8, 2022), https://www.haaretz.com/israel-news/2022-09-08/ty-article-magazine/.highlight/israels-most-planned-war-historical-mossad-file-details-lebanon-policy/00000183-1dce-d11f-a1e3-5fde579b0000 (on file with the *Columbia Law Review*).

267. Int'l Comm'n to Enquire into Reported Violations of Int'l L. by Isr. During Its Invasion of Leb., Israel in Lebanon (1983) [hereinafter MacBride Report].

268. See id. Seán MacBride was, among other things, the former Assistant Secretary General of the United Nations, former Minister of External Affairs of Ireland, and a Nobel Peace Prize winner. See Seán MacBride, Encyc. Britannica, https://www.britannica.com/biography/Sean-MacBride [https://perma.cc/2FG7-QNBC] (last updated Mar. 22, 2024).

constituted in August 1982, before the Sabra and Shatila massacres, to review the legality of the Israeli invasion and conduct in Lebanon.[269]

By the time both Commissions published their reports, the UN General Assembly had already adopted a resolution strongly condemning Israeli action, declaring the Sabra and Shatila massacre an "act of genocide" and calling to "suspend economic, financial and technological assistance to and co-operation with Israel."[270] Notably, the resolution included a clause deploring the United States' veto cast in favor of Israel earlier that year to prevent the implementation of a Security Council decision that declared the Israeli annexation of the occupied Syrian Golan Heights "null and void."[271]

Revisiting the almost-forgotten report four decades after its publication is revealing.[272] The Commission opens its report with a statement reflective of a momentous crisis facing the legitimacy of international law, one that seems acutely relevant to our present:

> It is easy to become cynical about the relevance of law to the conduct of war. Our sensibilities are by now flooded with images of massacres and atrocities committed in the name of this or that cause. These most gross, barbaric features of warfare, as present in modern times as in ancient, remind us also that international society lacks any consistent means of law enforcement. When it comes to war the attempt to have law without government often seems, indeed, like grasping at straws.[273]

And yet the Commission explained that the only hope is to salvage the project of international law by creating "a climate in which public opinion insists upon adherence by all states and political movements to the international law relative to war."[274] It thus moved forward to examine

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269. See MacBride Report, supra note 267, at v (describing the founding of the Commission).

270. G.A. Res. 37/123, at 37–38 (Dec. 16, 1982). The resolution was adopted by a majority of 123 member states with twenty-two abstaining votes. How Has My Country Voted at the UN?, Al Jazeera, https://interactive.aljazeera.com/aje/2019/how-has-my-country-voted-at-unga/index.html [https://perma.cc/R5TP-YGHT] (last visited Apr. 13, 2024).

271. G.A. Res. 37/123, supra note 270, at 37 (explaining that the General Assembly "[s]trongly deplores the negative vote by a permanent member of the Security Council which prevented the Council from adopting against Israel . . . the 'appropriate measures' . . . unanimously adopted by the Council" (emphasis omitted)); see also S.C. Res. 497 (Dec. 17, 1981).

272. Much of the legal scholarship on Sabra and Shatila barely mentions the MacBride report while extensively discussing the Kahan report. See, e.g., Linda A. Malone, The Kahan Report, Ariel Sharon and the Sabra-Shatilla Massacres in Lebanon: Responsibility Under International Law for Massacres of Civilian Populations, 1985 Utah L. Rev. 373, 413 n.184, 432 n.277 (describing the MacBride report only in a few footnotes, without any meaningful discussion); Yuval Shany & Keren R. Michaeli, The Case Against Ariel Sharon: Revisiting the Doctrine of Command Responsibility, 34 N.Y.U. J. Int'l L. & Pol. 797, 798 n.3 (2002) (mentioning the MacBride report only once in a footnote).

273. MacBride Report, supra note 267, at xi.

274. Id. at xiii.

at length the legal implications of the Israeli recourse to war, the conduct of war, and the occupation of Lebanon.[275]

The parallels that may be drawn between the past and the present fall beyond the scope of this Article. The conclusions of the Commission's report and its treatment of the question of genocide are, however, of utmost importance since they reveal the tensions embedded in the interpretation of the crime of genocide and the understanding of its legal boundaries. The UN Genocide Convention defines genocide as certain acts "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group."[276] These acts include, but are not limited to: "[k]illing members of the [protected] group" or "[c]ausing serious bodily or mental harm to members of the group" or "[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part."[277]

In examining the applicability of genocide to Israeli actions in Sabra and Shatila, the Commission members were split about the standard of intent required for the crime of genocide; specifically, two members of the Commission concluded that genocide "requires a special intent."[278] While the Commission refrained from issuing conclusive recommendations about genocide,[279] it still included an illuminating "Majority Note on Genocide and Ethnocide" in its appendices, where it expanded on the Commission's majority opinion pertaining to the question of genocide.[280] In this appendix, the Commission's approach attempts to trace the connections between the massacres in Sabra and Shatila and a broader objective of the Israeli regime it encountered:

> The massacres that took place at Sabra and Chatila in September 1982 can be described as genocidal massacres, and the term 'complicity in genocide' is wide enough to establish the responsibility of Israel for these acts. But the denial of nationality to Palestinians has resulted in all Palestinian social institutions being considered to be part of the apparatus of the 'terrorists of the PLO'. The borderline between [then Israeli Prime Minister] Mr[.] Begin's claim to 'eliminate the PLO' and the total destruction of the social organisation of the Palestinian people in Lebanon is a very narrow one and the constant reference to

275. Id.

276. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, 280.

277. Id.

278. MacBride Report, supra note 267, at x ("The majority . . . took the view that the actions of the Israeli authorities amounted to . . . genocide. Two members of the Commission, however, took the view that while the conduct . . . did constitute grave violations of international law, these violations did not amount to the crime of genocide which requires a special intent.").

279. Id. (recommending that, while the Commission's terms of reference did not require a finding of genocide, the conduct of the Israeli government must be evaluated to determine whether it amounted to genocide).

280. Id. at 194.

> the need to 'purify' the territory of the Lebanon of PLO elements has been conducive to attacks on the autonomy of the Palestinian people.[281]

The Commission stated that "there is evidence to show" that "the treatment of Palestinians in those dispersal areas occupied by Israel in Lebanon" was related to "Israeli policies in the West Bank."[282] Taken together, these policies "attempt to disrupt the social organisation of the Palestinian people to ensure that, through their disposal, their sense of identity and group loyalty would be weakened, if not destroyed."[283]

Contemplating the applicability of the Genocide Convention to the Israeli policies against the Palestinian people, the Commission concluded, "The definition of genocide is not limited to the formula adopted by the United Nations in . . . 1948. The legal concept of genocide is quite consistent with identifying policies designed to destroy the identity and will of a national group, as well as the Nazi paradigm of the Holocaust."[284]

In fact, the Commission went further to articulate the Palestinian condition as a "particular form of genocide," one that it considered consistent with Raphael Lemkin's concept of the term:[285]

> The particular form of genocide as applied to the Palestinians does not appear to be aimed at killing the Palestinians in a systematic fashion. It could be argued that if this was the intention, many more could have been killed. The specific form of genocide which can be said to apply is the adoption of all kinds of measures, short of killing, to destroy the national culture, political autonomy and national will in the context of the Palestinian struggle for national liberation and self-determination.[286]

The Commission's treatment of the applicability of genocide to the Palestinian condition at large is illustrative of the challenges that the international legal community has long faced in framing the Israeli injustices and crimes committed against the Palestinian people. The disagreement about the "correct" interpretation of genocide, and the underlying tensions and anxieties about the confines of our legal language, are precisely what led the Commission to ultimately recommend that "a competent international body be designated or established to

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281. Id. at 196.

282. Id.

283. Id.

284. Id. at 194.

285. Id. ("[G]enocide was never meant to cover simply the physical extermination of a people. . . . Raphael Lemkin, who coined the word, explained that genocide was intended to signify a co-ordinated plan of different actions aiming at the destruction of the essential foundations of the life of national groups . . . ."). Raphael Lemkin first developed the concept of genocide in his book *Axis Rule*. See Raphael Lemkin, Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress 79–80 (1944). See also infra note 336 and accompanying text.

286. MacBride Report, supra note 267, at 194.

clarify the conception of genocide in relation to Israeli policies and practices toward the Palestinian people."[287]

While no such international body was ever established, the International Court of Justice found, four decades later, that South Africa's genocide case against Israel for its war on Gaza was "plausible."[288] Gaza has reignited the scholarly interest in the conversation about the applicability of genocide to the Palestinian condition.[289] At the core of this conversation are questions about how the concept of genocide relates to the 1948 Nakba and whether the ongoing Nakba should be understood as a form of genocide.[290] In this context, scholars have developed and employed several variations on the term in relation to Palestine, including: politicide,[291] sociocide,[292] memoricide,[293] and others.[294]

And still, these discussions seem to have a life of their own in specialized journals, one that remains separated and siloed from the legal or popular understanding of the term "genocide." If "genocide" leads to an almost eternal debate about what it means, and whether it can be understood to include this or that interpretation for it to encompass the totality of the Palestinian reality, scholarship might as well acknowledge the Nakba for what it is: an organic articulation of the Palestinian condition. Recognizing the Nakba as its own concept allows us to synthesize different conversations that are otherwise tucked into separated disciplinary silos.

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287. Id. at 193.

288. See supra note 23 and accompanying text.

289. For an excellent summary and contribution to this conversation prior to the ongoing genocide in Gaza, see Haifa Rashed, Damien Short & John Docker, Nakba Memoricide: Genocide Studies and the Zionist/Israeli Genocide of Palestine, 13 Holy Land Stud. 1, 6 (2014) ("If we look at the publications of Genocide Studies, year after year Zionist Israel as a possible case study is an egregious absence.").

290. See id. at 3.

291. See Baruch Kimmerling, Politicide: Ariel Sharon's War Against the Palestinians 3 (2003) ("By *politicide* I mean a process that has, as its ultimate goal, the dissolution—or, at the very least, a great weakening—of the Palestinian people's existence as a legitimate social, political, and economic entity.").

292. See Saleh Abdel-Jawad, War by Other Means, Al-Ahram Wkly. (Jan. 8, 1998), republished in Ahram Online (May 16, 2023), https://english.ahram.org.eg/News/500920.aspx (on file with the *Columbia Law Review*) ("These drastic measures . . . to expel the indigenous population . . . have given way to a policy which I shall call 'sociocide', that is the gradual undermining of the communal and psychological structures of Palestinian society in order to compel the Palestinians to leave by other means.").

293. See Pappe, Ethnic Cleansing, supra note 21, at 225–35.

294. Nurhan Abujidi, Urbicide in Palestine: Spaces of Oppression and Resilience 64 (2014). The term "domicide" has also been invoked in relation to Gaza. See Mahdi Sabbagh, Taking Stock of an Unrecognizable Gaza: What Israel's Bombing Has Wrought, Curbed (Feb. 28, 2024), https://www.curbed.com/article/gaza-israel-urban-fabric-destruction-domicide-urbicide.html [https://perma.cc/L27M-GSDY] ("Some have referred to what is happening in Gaza as an act of domicide, or the systematic destruction of homes.").

The ongoing condition of the Nakba is not exactly genocide, although it may contain genocidal episodes that fulfill the legal definition of the term. The ongoing Nakba is the continuation of genocide *by other means*.[295] This Article does not argue for broadening the definition of genocide to include the totality of the Nakba, although that line of argumentation may be legally plausible.[296] Rather, this Article suggests distinguishing between these analytically independent concepts while recognizing their potential overlap. While the ongoing Nakba has involved acts of genocide—and most recently what has been called a "textbook case of genocide"[297]—this overlap does not mean that Nakba is synonymous with genocide or that genocide is synonymous with Nakba.

III. NAKBA AS A LEGAL CONCEPT

The notion of Nakba is absent from law. To generate the language we lack, to name the Palestinian condition of domination, and to provide an adequate legal framework for the structures of oppression in Palestine, we must recognize and theorize the ongoing Nakba as a legal concept. The concept of Nakba is the most genuine articulation of the Palestinian

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295. The idea of Nakba as genocide by other means reflects both a conceptual and historical argument. Historically, the Nakba has stemmed out of the repercussions of the Holocaust and the collective trauma of the Holocaust has become intertwined with the collective trauma of the Nakba. See Bashir Bashir & Leila Farsakh, Introduction: Three Questions that Make One, *in* The Arab and Jewish Questions, supra note 124, at 1, 5 ("Palestinian and Arab writers have found in literature a productive space to unpack the implications of the Holocaust for Palestinian, and Jewish, political rights in Palestine . . . [and] the tragic entanglement of the Jewish question and the Holocaust with the question of Palestine and the Nakba."); Bashir Bashir & Amos Goldberg, Introduction: The Holocaust and the Nakba: A New Syntax of History, Memory, and Political Thought, *in* The Holocaust and the Nakba, supra note 31, at 2 ("Neither the Holocaust nor the Nakba represents the totality of Jewish or Palestinian identity in the early twenty-first century; however, both are central, perhaps even crucial components in the collective identity and consciousness of each of the two peoples."). Nakba and genocide are tangent concepts. French philosopher Gilles Deleuze argued in this context that Nakba is "a genocide, but one in which physical extermination remains subordinated to geographical evacuation . . . . Physical extermination, though it may or may not be entrusted to mercenaries, is most certainly present. But this isn't a genocide, they say, since it's not the 'final goal' . . . it's just one means among others." Gilles Deleuze, The Grandeur of Yasser Arafat, 20 Discourse at 30, 31 (1998).

296. See, e.g., The Genocide of the Palestinian People: An International Law and Human Rights Perspective, Ctr. for Const. Rts. (Aug. 25, 2016), https://ccrjustice.org/genocide-palestinian-people-international-law-and-human-rights-perspective [https://perma.cc/UYR3-DVJA].

297. See, e.g., Raz Segal, A Textbook Case of Genocide, Jewish Currents (Oct. 13, 2023), https://jewishcurrents.org/a-textbook-case-of-genocide [https://perma.cc/FMF4-CYRV] (describing Israel's campaign in Gaza as a "textbook case of genocide"); Letter from Craig Mokhiber, Dir. New York Off. of the High Comm'r for Hum. Rts., to Volker Turk, UN High Comm'r for Hum. Rts. (Oct. 28, 2023), https://s3.documentcloud.org/documents/24103463/craig-mokhiber-resignation-letter.pdf [https://perma.cc/L93G-L5VU] (same); see also supra note 23.

condition as derived from the material reality and collective vernacular of its victims.

Conceptualizing Nakba in law allows us to explore new ways to think about Palestine, to ask new questions, to identify the root cause of violence, to synthesize existing concepts, and ultimately, to imagine new configurations to undo Nakba. One quality of Nakba is that it has become an ever-present condition: Nakba continues to unfold as those who experienced its foundational violence die, and its trauma is transmitted and reenacted across generations. Once understood as an ongoing process, Nakba brings into view a totality that is greater than the sum of its parts.

This Part is an initial attempt toward a legal conceptualization of Nakba, one that not only locates the Palestinian reality in law but also derives law from the Palestinian reality. Part III.A. provides a brief etymology of the term "Nakba," tracing its evolution from a rupture into an enduring structure. Part III.B. goes on to identify three components—foundation, structure, and purpose—that together form a legal anatomy of the ongoing Nakba.

A. *A Brief Etymology of a Concept*

The term "Nakba," meaning "catastrophe," has been used to signify changing, and often competing, meanings. Nakba has most commonly been invoked to signify two temporal modes: one that relegates it to the past, and one that extends it to the present. In the first instance, the Nakba—always with a definite article—signifies the manifestations of the 1948 war on Palestine, the mass dispossession and displacement of Palestinians, and the destruction of Palestinian society at large. The second instance is used to refer to the totality of Palestinian condition of subjugation and domination that spans from 1948 through the present.

This Article uses the term "Nakba" in three distinct ways: "1948 Nakba" to refer to the foundational event(s) of the Palestinian Nakba; "ongoing Nakba" to refer to the continuous Palestinian reality since 1948; and "Nakba," without a definite article, to introduce a broader concept, including in law, which may be applied to Palestine and prove useful to other contexts as well. A brief exploration of the term "Nakba" shows that its meaning has undergone significant transformations over time. While the term has a long and under-researched intellectual history,[298] this

298. One famous invocation of the term "Nakba" is associated with the trial and expulsion of twelfth-century Andalusian philosopher Ibn Rushd (Averroes) from Andalusia to Marrakesh. See Ahmad Mahmoud, Nakbat Ibn Rush [The Nakba of Ibn Rush], Al-Ahram (Apr. 18, 2016), https://gate.ahram.org.eg/daily/News/151878/59/499539/ [https://perma.cc/KF3M-CBYP]. Prior to 1948, the term Nakba had been used to refer to different types of calamities, ranging from massacres to famine. At least two books from the late nineteenth century and early twentieth century use the word "nakabat" (plural of nakba) in their title to refer to the massacres of Christians and Armenians in the late nineteenth and early twentieth century. See Shahin Makaryus, Hasr al-Litham 'an Nakabat al-Sham [Disasters of the Levant Revealed] (1895); Is-haq Armaleh, Al-Qousara fi Nakabat

section offers a brief etymology of the term as it relates to Palestine.[299] Since 1948, the term "Nakba" has become almost synonymous with the Palestinian experience, and as novelist Elias Khoury put it, "when a word becomes an untranslatable proper name, we have to try to understand the wisdom of language."[300]

1. *The Nakba as a Rupture.* — The emergence of the word "Nakba" points to an issue broader than the calamity befalling its direct and primary victims, the Palestinian people. Since its association with Palestine, the term "Nakba" has been inextricably related to the fate of the Arab nations. The term was first invoked in the context of the Zionist conquest of Palestine by the Syrian intellectual Constantine Zurayk, in his book *Ma'na al-Nakba* (later translated as *The Meaning of the Disaster*), published during the summer truce of 1948 and against the background of a decisive Arab defeat in the war.[301]

As early as 1948, Zurayk realized that the magnitude and ramifications of the Zionist conquest of Palestine were unparalleled. Zurayk opens his book by stating:

> The defeat of the Arabs in Palestine is no simple setback or light, passing evil. It is a disaster in every sense of the word and one of the harshest of the trials and tribulations with which the Arabs have been affected throughout their long history—a history marked by numerous trials and tribulations.[302]

Annasara [The Foremost Disasters of Christians] (1919). Notably, writer and editor Shahin Makaryus's book *Hasr al-Litham 'an Nakabat al-Sham* opens with a description of the Levant's geography and describes four major religious communities living in the Levant: Muslims, Christians, Jews, and Druze. Makaryus, supra, at 3–8. Makaryus interestingly uses the terms "Jews" and "Israelis" interchangeably as early as 1895, writing that the Israeli sect mostly resided in the al-Quds' area and were gradually growing in numbers out of the belief that the land would soon be theirs, especially because they were supported by Jewish figures that would help them purchase lands and build settlements. See id. at 8.

299. While I am unaware of any scholarship about the concept of Nakba before 1948, two main articles have studied the concept of Nakba in Arab thought after 1948. See Anaheed Al-Hardan, Al-Nakbah in Arab Thought: The Transformation of a Concept, 35 Compar. Stud. S. Asia, Afr. & Middle E. 622 (2015) [hereinafter Al-Hardan, Al-Nakbah in Arab Thought]; Ali E. Hillal Dessouki, Arab Intellectuals and Al-Nakba: The Search for Fundamentalism, 9 Middle E. Stud. 187 (1973).

300. Elias Khoury, Rethinking the Nakba, 38 Critical Inquiry 250, 255 (2012) [hereinafter Khoury, Rethinking the Nakba].

301. Constantine K. Zurayk, The Meaning of the Disaster (R. Bayly Winder trans., 1956) (1948). Zurayk was a man of many hats: a pan-Arab intellectual, a Princeton-educated historian, a Professor and Vice President of the American University of Beirut (AUB), a President of the Syrian University of Damascus (SU), a founding member of the Institute for Palestine Studies, the First Counselor to the Syrian Legation to the United States, and Syria's representative at the United Nations and Security Council, among many other things. See Hana Sleiman, History Writing and History Making in Twentieth Century Beirut 42, 56, 68 (2021) (Ph.D. dissertation, University of Cambridge), https://api.repository.cam.ac.uk/server/api/core/bitstreams/94e553c7-e907-4389-9f70-92ccce443616/content [https://perma.cc/A6BE-ZKLZ].

302. Zurayk, supra note 301, at 2.

The book, premised on the rejection of Zionism as a settler project in Palestine, offers a scathing critique of Arab sociopolitical conditions and warns of the existential crisis facing Arab nationalisms.[303] To undo the Nakba, Zurayk called for a radical reconfiguration of Arab societies, one that is premised on the ideals of science, modernity, and rationality.[304]

For Zurayk, the Nakba was at its core an Arab issue unfolding in Palestine rather than a Palestinian issue projecting itself onto the Arab world.[305] The Nakba, for the Arab consciousness of the time, posed an existential threat both to the territorial continuity of the Arab world and the very idea of Arab nationhood, modernity, and future. As Said writes, Zurayk understood the Nakba as a "deviation, a veering out of course."[306] He articulated the Nakba as a problem of the present, one that had diverted the Arab world from a progressive path into a regressive and catastrophic future.[307] Said elaborates:

> The development of Zurayk's argument in his book led him, as it was to lead many other writers since 1948, to interpret *al-nakba* as a rupture of the most profound sort. . . . So strong was the deflection, or the deviation, from the Arabs' persistence in time up to 1948, that the issue for the Arabs became whether what was "natural" to them—their continued national duration in history—would be possible at all.[308]

This understanding of the Nakba as a Palestinian manifestation of an Arab tragedy was a common thread among Zurayk's generation of Arab

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303. Id. at 34–35.

304. Id. at 39–40.

305. Id. at 49.

306. Edward Said, Arabic Prose and Prose Fiction After 1948, *in* Reflections on Exile and Other Essays 41, 47 (2000) [hereinafter Said, Arabic Prose].

307. Id. at 47–48. Writing on the Nakba's effect on the history of the Arab world, Said observed:

> [F]rom the perspective of the past, the Arabs would seem to have swerved from the path toward national identity, union, and so on; from the perspective of the future, the disaster raised the specter of national fragmentation or extinction. The paradox is that both of these observations hold, so that at the intersection of past and future stands the disaster, which on the one hand reveals the deviation from *what has yet to happen* (a unified, collective Arab identity) and on the other reveals the possibility of *what may happen* (Arab extinction as a cultural or national unit). The true force then of Zurayk's book is that it made clear the problem of the *present*, a problematic site of contemporaneity, occupied and blocked from the Arabs. For the Arabs to act knowingly was to *create* the present, and this was a battle of restoring historical continuity, healing a rupture, and—most important—forging a historic possibility.

Id. (discussing Zurayk, supra note 301).

308. Id. at 47.

intellectuals,[309] who produced a variety of works on the subject.[310] Zurayk and his milieu of Arab intellectuals used the term Nakba to identify, name, and theorize a calamity that their generation experienced when "[n]o concept seemed large enough, no language precise enough to take in the common fate."[311]

2. *The Nakba as a Structure.* — When Israel defeated the Arab states in the 1967 war—an event that became known as the *naksa* (meaning setback)—various claims about the meaning of Nakba arose in relation to the more recent defeat.[312] In his book *Ma'ana al-Nakba Mujaddadan* (*The Meaning of the Nakba Again*), Zurayk contested the term "naksa" and insisted on calling 1967 "a catastrophe [*nakba*] and not a setback [*naksa*]."[313] For Zurayk, and many other writers, the 1967 defeat was another Nakba grounded in the 1948 Nakba.[314] As Zurayk puts it, the 1967 defeat reflected an "old meaning . . . anew."[315]

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309. See Anaheed Al-Hardan, Palestinians in Syria: Nakba Memories of Shattered Communities 35 (2016) [hereinafter Al-Hardan, Palestinians in Syria] (explaining that for this generation of intellectuals, the "pan-Arab link remains important and the Nakba cannot be understood outside this context").

310. 'Arif al-'Arif, for example, published between 1958 and 1960 a six-volume book titled *al-Nakba* in which he explains his choice of the term:

> How can I not call it [the book] 'The Nakba'? We have been afflicted by catastrophe, we the Arabs in general and the Palestinians in particular, during this period of time in a way in which we have not been subjected to a catastrophe in centuries and in other periods of time: our homeland was stolen, we were thrown out of our homes, we lost a large number of our sons and of our young ones, and in addition to all this, the core of our dignity was also afflicted.

Id. at 35 (internal quotation marks omitted) (quoting 'Arif al-'Arif, 1 Al-Nakba: Nakbat Beit al-Maqdis wal-Firdaws al-Mafqood bayn 'amay 1947–1949 [The Nakba: The Nakba of Jerusalem and the Lost Paradise, 1947–1949], at 3 (1956)). Other important contributions from that period include publications by Musa Alami, Muhammad Nimr al-Khatib, Jurj Hanna, and Qadri Tuqan, among others. See Al-Hardan, Palestinians in Syria, supra note 309, at 31.

311. See Said, Arabic Prose, supra note 306, at 46. A more comprehensive exploration of these works can be found in Al-Hardan, Palestinians in Syria, supra note 309; Al-Hardan, Al Nakbah in Arab Thought, supra note 299; and Dessouki, supra note 299.

312. Seikaly, JPS as Archive, supra note 43, at 56 (showing that some academics "framed the disaster as a setback, Naksa, a rhythmic analogue to, but less injurious than, the Nakba or catastrophe" and that they "still call it Naksa despite the consensus that 1967 was but a station in an ongoing catastrophe"); see also Al-Hardan, Palestinians in Syria, supra note 309, at 41 ("In his insistence on 1948 and 1967 as catastrophes rather than mere setbacks, Zurayk seems to be directly contesting Nasser's response to the latest defeat.").

313. Al-Hardan, Palestinians in Syria, supra note 309, at 41 (internal quotation marks omitted) (quoting Constantine Zurayk, Ma'na al-Nakba Mujaddadan [The Meaning of the Nakba Again] 996 (1967)).

314. Id. ("Although the works that emerged in the aftermath of 1967 assessed the new defeat in different ways, what they shared in common was linking 1967 and 1948.").

315. Id. at 42 (alteration in original) (internal quotation marks omitted) (quoting Constantine Zurayk, Ma'na al-Nakba Mujaddadan [The Meaning of the Nakba Again] 1031 (1967)).

Although Zurayk continued to understand the Nakba as a rupture, he simultaneously planted the seeds for an emerging conception of the Nakba as a process that looms over the Arab and Palestinian condition at large. As Arab fragmentation became all the more entrenched, the Nakba became all the more Palestinian. It grew to encapsulate the totality of the Palestinian experience: an overarching frame that encompasses the individual and collective subjugation of the Palestinian people and can be traced to the constitutive violence of 1948.[316]

Said, for example, articulated the Nakba as an "explosion" that continues to irrevocably shape the present.[317] As he put it elsewhere, "For Palestinians, a vast collective feeling of injustice continues to hang over our lives with undiminished weight."[318] While Said did not explicitly define the Nakba as both the "explosion" and the continuous process itself, others have started to articulate this notion. The famed Palestinian poet Mahmoud Darwish wrote, for example, that "the Nakba is an extended present that promises to continue in the future. . . . [W]e continue to live [the Nakba] in the here and now."[319]

The conception of the Nakba as an ongoing process has gradually emerged as an internal response to the intellectual tradition spanning

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316. Palestinian writer and poet Mohammed El-Kurd encapsulates the collective and individual experiences of the Nakba by writing:

> For Palestinians, the Nakba is relentless and recurring. It happens in the present tense—and it happens everywhere on the map. Not a corner of our geography is spared, not a generation since the 1940s. For my own family, the Nakba was my grandmother's experience of expulsion from Haifa by the Haganah in 1948—but it was also her cautionary tales warning me of what would inevitably be my fate when army-backed settlers with Brooklyn accents took over half of my home in Sheikh Jarrah in 2009, declaring my house their own by divine decree. For other families, the Nakba began when a beloved grandfather was expelled from Jaffa and sought refuge in Gaza—where it continues in the rumble of the warplanes dropping bombs on overcrowded refugee camps, introducing his grandchildren to their first (or perhaps third or sixth) war. It is their faces on the posters that are yet to be printed.

Mohammed El-Kurd, Reflections on the 75th Anniversary of a Nakba that Never Ended, The Nation (May 15, 2023), https://www.thenation.com/article/world/reflections-on-the-75th-anniversary-the-nakba/ [https://perma.cc/PD46-M59J].

317. Said, Arabic Prose, supra note 306, at 46 ("The year and the processes which [the Nakba] culminated represent an explosion whose effects continue to fall unrelentingly into the present.").

318. Edward W. Said, Introduction: The Right of Return at Last, *in* Palestinian Refugees, supra note 180, at 1.

319. Mahmoud Darwish, Not to Begin at the End, Al-Ahram Wkly. (2001), https://web.archive.org/web/20011202055655/http:/www.ahram.org.eg/weekly/2001/533/op1.htm (on file with the *Columbia Law Review*) (translated from Arabic to English). The notion of the Nakba as an ongoing and repetitive process of loss has predated the usage of the phrase "ongoing Nakba." See, e.g., Shir Alon, No One to See Here: Genres of Neutralization and the Ongoing Nakba, 27 Arab Stud. J. 90, 92 (2019) (charting the use of the term "ongoing Nakba" from its first use in 2001 to ubiquity in 2008).

from Zurayk to Said, and their interpretation of its meaning.[320] The Nakba has become a sort of suspension in time, a liminal condition that defines the time and space between a romanticized past and a barely imaginable future.[321] In this context, the desire to articulate the Nakba as an overarching framework reflected an attempt to theorize the Palestinian experience as a distinctive form of colonialism,[322] which may be understood in line with the articulations of apartheid as "Colonialism of a Special Type."[323] Reflective of this understanding is a 2001 address at the conference against racism in Durban, South Africa, where Hanan Ashrawi stated that the Palestinian people constitute "a nation in captivity held hostage to an ongoing *Nakba* [catastrophe], as the most intricate and pervasive expression of colonialism, apartheid, racism, and victimization."[324]

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320. In an intervention that crystalizes this critique, Khoury notes that Zurayk's analyses neglect "the nature of the *nakba*" and rather understand the Nakba as "a historical event"; Zurayk's view does not consider "that the Zionist victory in 1948 was the beginning of the process and not its end." Khoury, Rethinking the Nakba, supra note 300, at 250, 256.

321. Historian Sherene Seikaly argued in this context:

> In the age of catastrophe, Palestine is a paradigm. It can teach us about our present condition of the permanent temporary: we are all unclear about what the future holds. We are all suspended in time with no end in sight. We are all uncertain if there is any "normal" to which we can return. For some, this realization is a rupture. For most, violence and dispossession are not interruptions. They are markers of the temporal and spatial suspension that make up the everyday.

See Sherene Seikaly, Nakba in the Age of Catastrophe, Jadaliyya (May 15, 2023), https://www.jadaliyya.com/Details/45037 [https://perma.cc/4LK2-QVMB] [hereinafter Seikaly, Age of Catastrophe].

322. Since the turn of the century, Palestinian scholars have intensified the study of settler colonialism as it applies to Palestine, situating the Nakba as the distinctive structure of settler colonialism in Palestine:

> [V]iewed through the lens of settler colonialism, the *Nakba* in 1948 is not simply a precondition for the creation of Israel or the outcome of early Zionist ambitions; the *Nakba* is not a singular event but is manifested today in the continuing subjection of Palestinians by Israelis. In order to move forward and create a transformative, liberatory research agenda, it is necessary to analyse Zionism's structural continuities and the ideology that informs Israeli policies and practices in Israel and toward Palestinians everywhere. In other words, while Israel's tactics have often been described as settler colonial, the settler colonial *structure* underpinning them must be a central object of analysis.

Omar Jabary Salamanca, Mezna Qato, Kareem Rabie & Sobhi Samour, Past Is Present: Settler Colonialism in Palestine, 2 Settler Colonial Stud., no. 1, 2012, at 1, 2 (emphasis omitted).

323. Ronnie Kasrils, Birds of a Feather: Israel and Apartheid South Africa—Colonialism of a Special Type, *in* Many Faces of Apartheid, supra note 225, at 25 ("Israel, from its very conception and inception, embodies similar features ascribed to 'Colonialism of a Special Type' (CST), the term coined by the South African Communist Party in 1962 . . . .").

324. Hanan Ashrawi, Member, Palestinian Auth. Legis. Council, Address Before the United Nations Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerances (Aug. 28, 2001), *in* 41 Islamic Stud. 97, 98 (2002).

Professor Joseph Massad has also criticized the relegation of the Nakba to the past:

Such articulations of the ongoing Nakba have since become all the more common.[325] While different interventions highlight different features of the Nakba, common ground among them is the idea that 1948 was a foundational moment that has restructured Palestinian lives and continues to subject Palestinians to various forms of violence.[326] Taken

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> To identify the Nakba as a past and finished event is to declare its success and insist on the irreversibility of its achievements. It is to insist that there is no longer a struggle to define it, nor a successful resistance that stands in its way. It is to grant it historical and political legitimacy as a fact of life, but also to endow all its subsequent effects as its natural outcome.

Joseph Massad, Resisting the Nakba, Al-Ahram Wkly. (May 15, 2008), republished in Elec. Intifada (May 16, 2008), https://electronicintifada.net/content/resisting-nakba/7518 [https://perma.cc/PHE8-2X3Y] [hereinafter Massad, Resisting the Nakba].

325. Scholar Karma Nabulsi, for example, positions the destruction of Palestinian collectivity as the binding force of the ongoing Nakba, noting that "the relentless and dynamic nature of the Catastrophe - because it is an ongoing daily Palestinian experience - the current attempts to destroy the Palestinian collectivity today bind this generation directly to that older one, and bind the exile to the core of the Palestinian body politic." Karma Nabulsi, From Generation to Generation, Ongoing Nakba, al-Majdal, Spring 2006, at 12, 14.

Elias Khoury instead asks "[h]ow can we read the *nakba* today, and what is the place of memory in this reading?" Khoury, Rethinking the Nakba, supra note 300, at 257–58. In this context, Khoury articulates four pillars of loss that are central to the ongoing Nakba: the loss of the land; the loss of the city; the loss of the name; and the loss of the ability to narrate. See id. at 259–60.

Joseph Massad, in contrast, positions the agency of Palestinians, the subjects of the Nakba, at the center of its ongoing nature: "To insist that the Nakba is a present continuous act of destruction that remains unfinished is to resist acknowledging that its work has been completed. Palestinian resistance is what accounts for the unfinished work of the Nakba and for its ongoing brutality." Massad, Resisting the Nakba, supra note 320.

Ilan Pappe posits ethnic cleansing as the defining feature of the ongoing Nakba, so much so that the Nakba becomes subsumed by ethnic cleansing: "[T]he Nakba continues, or more forcefully and accurately, the ethnic cleansing rages on." Ilan Pappe, Calling a Spade a Spade: The 1948 Ethnic Cleansing of Palestine, Ongoing Nakba, al-Majdal, Spring 2006, at 21, 21.

326. Rashid Khalidi has argued that "the Nakba can be understood as an ongoing process," positioning expulsion as its dominant feature and understanding it as part of "a colonial war waged against the indigenous population, by a variety of parties, to force them to relinquish their homeland to another people against their will." Khalidi, Hundred Years' War, supra note 35, at 9, 75.

Scholar Tareq Baconi has contended that the ongoing Nakba is a "relentless structure of colonization" that includes "many microcosms . . . and multiple frontlines" that are "not just fragmented geographically" but "also exist on a temporal continuum." Tareq Baconi, Sheikh Jarrah: Ethnic Cleansing in Jerusalem, Madamasr (June 20, 2022), https://www.madamasr.com/en/2022/06/20/feature/politics/sheikh-jarrah-ethnic-cleansing-in-jerusalem/ [https://perma.cc/VX7B-3TE2].

El-Kurd has articulated dispossession as the overarching theme of the ongoing Nakba: "For Palestinians, the Nakba is relentless and recurring. . . . The Zionist movement has worked to make dispossession a timeless theme of the Palestinian experience . . . ." El-Kurd, supra note 316.

Seikaly has argued that the Nakba's "present condition of the permanent temporary" holds "an abundance of lessons about persisting in the looped and looping time of the

together, these articulations provide a rich and organic corpus that theorizes the Palestinian condition.[327] The framework of the ongoing Nakba is thus an overarching concept that captures the totality of the Palestinian experience across time and space, one in which the Nakba features not as a rupture but as a structure.[328] And yet, the entanglement of the Nakba in law has been scarcely theorized. This Article attempts to ask and provide an initial answer to the question of how we might conceptualize the ongoing Nakba in legal terms.

B. *A Legal Anatomy of the Ongoing Nakba*

A legal conceptualization of the ongoing Nakba must encompass the Nakba's transformation from rupture to structure. We need to ask: What is Nakba's foundational violence? What is its structure? What purpose has it served, and what purpose does it continue to serve? Answering these questions will allow us to give substance to a concept in the making. This section conceptualizes the legal pillars of Nakba by identifying three elements—foundation, structure, and purpose—that together form a comprehensive legal framework for understanding the Palestinian condition.

In a nutshell, the foundational violence of the 1948 Nakba has not only dispossessed and displaced Palestinians but also fractured Palestinian society and put in place a new regime that is committed to denying Palestinian self-determination in favor of the settler society. The structure of this regime overlaps with apartheid and is best defined by the concept

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present" in which "[w]e are all suspended in time with no end in sight." Seikaly, Age of Catastrophe, supra note 321.

Writer Rana Issa has written that the "[N]akba is the paradigm of suffering that turned [her] . . . aunts and cousins [from Palestinian town Tarshiha] into total strangers" and is "not only a paradigmatic shared narrative, but also a concept that is laden with fractured experiences, singular and experientially divisive." Rana Issa, Nakba, Sumud, Intifada: A Personal Lexicon of Palestinian Loss and Resistance, The Funambulist (Oct. 25, 2023), https://thefunambulist.net/magazine/redefining-our-terms/nakba-sumud-intifada-a-personal-lexicon-of-palestinian-loss-and-resistance [https://perma.cc/UR7N-6GEK] (emphasis omitted).

Erakat has argued that Israel is pursuing "Nakba Peace," namely "the establishment of security achieved through the removal of native Palestinians who, by their very existence and refusal to disappear, challenge Zionist settler sovereignty." Noura Erakat, Inst. for Palestine Stud., Nakba Peace: Israel's Demand for Exception to the Prohibition on Genocide 2 (2024), https://www.palestine-studies.org/en/node/1655200 [https://perma.cc/6QPB-H8AD] [hereinafter Erakat, Nakba Peace].

327. For a rich study that demonstrates the centrality of the ongoing Nakba framework to the third generation of Palestinians after the 1948 Nakba, see generally Zarefa Ali, A Narration Without an End: Palestine and the Continuing Nakba (Masters thesis, Birzeit University) (Sept. 11, 2012), https://fada.birzeit.edu/bitstream/20.500.11889/1502/1/thesis_19022013_102752.pdf [https://perma.cc/5T7K-PMZW].

328. Additional studies and edited volumes that address the Nakba and its continuity include: Diana Allan, Voices of the Nakba: A Living History of Palestine (2021) and Abu-Lughod & Sa'di, supra note 2.

of legal fragmentation, namely, the stratification and classification of Palestinians into distinctive legal statuses that correspond with different forms of violence and divergent degrees of legal privilege.

The breakdown of Nakba into foundation, structure, and purpose provides an analytical roadmap for the various legal questions at play. The foundational element allows us to consider the crimes committed during the 1948 Nakba and the unresolved legal questions stemming from the establishment of the State of Israel over Palestinian ruins. The structural element allows us to examine the various forms of domination practiced by the Israeli regime that emerged from that violence. The discussion about apartheid is thus located within the structural element of the Nakba. The purpose—denying Palestinians the right to self-determination—allows us to reconsider the legal questions pertaining to the denial of territorial integrity and ability to exercise self-determination as a group. Taken together, these elements form a legal anatomy of the ongoing Nakba. More about these elements later.[329]

What form should the Nakba take in law is a separate question. One obvious way to articulate Nakba in legal terms is to codify its elements in the form of a convention, such that it is placed on par with other atrocity crimes emerging from major historical calamities, specifically the crimes of apartheid and genocide.

Generalizing a legal framework based on the Palestinian experience may prove applicable to other contexts as well. Nakba may be thought of as an aggregation or continuum of different crimes, some of which are recognized in international law and others which are not. On an abstract level, Nakba must be able to account for a wide spectrum of injustices, including indefinite denial of self-determination, illegal and nonconsensual partitioning of a territory by force, conquest and ethnic cleansing, demographic engineering of a population, denial of refugees' right of return, indefinite military occupation, settlement of an occupied territory, annexation of an occupied territory, implementation of apartheid, and enactment of genocidal violence. On a material level, each act of killing, maiming, imprisoning, shelling, expelling, or otherwise subordinating can be understood as an act of Nakba.

Criminalization may seem to be a natural byproduct of codifying Nakba as a legal concept. It is crucial, however, to remember that there is more to law than the act of criminalization.[330] In fact, criminal law

329. See infra section III.B.1.–B.3.

330. The convention, if adopted, has the potential to not only clarify the legal configurations that make up the crime of Nakba, but also deal with other legal questions such as the imposition of third state responsibility, reparations for group crimes, or the illegality of indefinite occupation. South Africa, despite adopting a convention that declared apartheid a crime against humanity, has resorted to a model of transitional justice based on Truth and Reconciliation Committees rather than criminal prosecution. See Natasa Mavronicola & Mattia Pinto, The Hegemony of Penal Accountability: Some Critical Reflections During (Ongoing) Atrocities, Eur. J. Int'l L.: Talk! (Dec. 15, 2023),

approaches have often proven ineffective in breaking down political structures of violence and domination.[331] The criminalization of Nakba may still be useful insofar as it sets a legal frame of reference, advances an understanding of the violence at play, recognizes Palestine as its paradigm case, and highlights the international community's disapprobation of its persistence. It is beyond the scope of this Article to articulate a doctrine of the crime of Nakba. Nevertheless, the practice of making new legal categories is not only constructive of legal doctrine but often contributes to the formation and development of norms and narrative structures.[332] Put simply, there is value in the process of legal recognition itself.

Before outlining the elements of Nakba as a legal concept, which are potentially instructive in future articulations of doctrine, a few notes on the making of legal categories are due. The guardians of the status quo and doctrine may claim that there is no need to recognize the Nakba as a legal concept, cast doubt on its generalizability, or claim that international law already includes different recognized crimes applicable to the Palestinian context. But these traditionalists miss a crucial point: The value of developing the Nakba as a legal concept lies not necessarily in the potential for its criminalization but in its recognition as a distinctive modality of group domination.

Naming certain manifestations of violence and oppression and assigning them legal meaning lies at the core idea of what law is. In fact, the making of new crimes is not unique to international law. Consider, for example, the recognition of sexual harassment or hate crimes as distinctive legal categories that highlight crucial facets of a behavior which is often already prohibited.[333] Underlying this notion is an understanding that

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https://www.ejiltalk.org/the-hegemony-of-penal-accountability-some-critical-reflections-during-ongoing-atrocities/ [https://perma.cc/SS6H-VW5Y] (cautioning against "[l]imiting the scope of legitimate condemnation to the penal frame and the legal process").

331. See, e.g., Mahmood Mamdani, Beyond Nuremberg: The Historical Significance of the Post-Apartheid Transition in South Africa, 43 Pol. & Soc'y 61, 63–66 (2014) (arguing that Nuremburg was "symbolic and performative" and obtained "little justice for victims"); Immi Tallgren, The Sensibility and Sense of International Criminal Law, 13 Eur. J. Int'l L. 561, 593 (2002) ("[A]n overwhelming majority of the crucial problems of the societies concerned are not adequately addressed by criminal law."); Ruti Teitel, Transitional Jurisprudence: The Role of Law in Political Transformation, 106 Yale L.J. 2009, 2040–41 (1997) (noting that "our intuitions regarding the nature of criminal liability in ordinary times may not account well for transitional criminal justice"). But see Diane F. Orentlicher, Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime, 100 Yale L.J. 2537, 2540 (1991) ("[T]he central importance of the rule of law in civilized societies requires, within defined but principled limits, prosecution of especially atrocious crimes.").

332. See Cover, supra note 30, at 7–9 (explaining that "[j]ust as the meaning of law is determined by our interpretive commitments, so also can many of our actions be understood only in relation to a norm").

333. See Catharine A. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination 77–81 (1979) (tracing the definition and development of sexual

violence committed against members of a particular group is regarded as especially heinous and therefore deserving of distinctive recognition in the legal domain.[334]

International law has thus often recognized new, specific types of violence and domination against groups, even when these acts could be tried, analyzed, or classified under existing legal concepts. The Nuremberg Trials, for example, preceded the codification of the Genocide Convention and predominantly relied on the legal framework of crimes against humanity, rather than genocide, to prosecute the Nazi atrocities against the Jewish people.[335] And yet, the international community proceeded to develop an overlapping, yet distinctive, legal concept of genocide, culminating in its codification in the Genocide Convention in 1948.[336] The need for such recognition was motivated not by the idea that crimes against humanity were not bad enough but rather by the fact that crimes against humanity were not *specific* enough.[337]

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harassment); Reva B. Siegel, Introduction: A Short History of Sexual Harassment, *in* Directions in Sexual Harassment Law 1, 1–28 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004) (same); Keller G. Sheppard, Nathaniel L. Lawshe & Jack McDevitt, Hate Crimes in a Cross-Cultural Context, Oxford Rsch. Encycs.: Criminology & Crim. Just. (Feb. 23, 2021), https://oxfordre.com/criminology/display/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-564 [https://perma.cc/52Q4-HW68] (noting that "the *motivation* of criminal behavior is the critical element of [hate crimes], distinguishing them from other offenses").

334. See, e.g., Sheppard et al., supra note 333. Sheppard, Lawshe, and McDevitt note that this type of violence is "considered especially harmful due to its profound impact on not only the well-being of individuals but also the community in which that individual belongs" and that "[i]n recognition of the personal and societal harms caused by bias-motivated offenses, many nations have sought to criminalize hate-motivated violence." Id.

335. See William A. Schabas, Genocide in International Law: The Crimes of Crimes 36–42 (2000) [hereinafter Schabas, Crimes of Crimes]. For additional background on the Nuremburg Trials' legal framework, see generally Donald Bloxham, Genocide on Trial (2001) (explaining the similarities and differences among the various post–World War II prosecutions of Nazi criminality); Philippe Sands, East West Street (2017) (tracing the genealogies of genocide and crimes against humanity through the lives of Raphael Lemkin and Hersch Lauterpacht, respectively, and highlighting the different theory of rights—group rights versus individual rights—that underpins each concept).

336. See Schabas, Crimes of Crimes, supra note 335, at 51–101 (tracing the "[d]rafting of the Convention and subsequent normative developments"); see also Raphael Lemkin, Genocide as a Crime Under International Law, 41 Am. J. Int'l L. 145, 147 (1947) (defining genocide as "a wide range of actions" that are all "subordinated to the criminal intent to destroy or to cripple permanently a human group"); Matthew Lippman, The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 3 B.U. Int'l L.J. 1, 1 (1985) (noting that Lemkin coined the term "genocide" in 1944).

337. Schabas, Crime of Crimes, supra note 335, at 38 ("[The Holocaust] is a crime so monstrous, so undreamt of in history through the Christian era up to the birth of Hitlerism, that the term 'genocide' had to be coined to define it." (internal quotation marks omitted) (quoting French prosecutor Champetier de Ribes)).

Generating legal language, and by extension doctrine, to name certain types of oppression is a crucial step toward demanding justice.[338] It is against this background that the international community has also recognized the crime of apartheid as deserving of distinctive legal formulation and prohibition,[339] even though it could have equally been addressed in the abstracted terms of crimes against humanity.[340] The 1973 adoption of the Apartheid Convention did not bring about the immediate end of apartheid in South Africa, but it galvanized a process that evidently contributed to that endpoint.[341]

The codification of genocide and apartheid as grave crimes of international law has recognized the collective harm inflicted by the Holocaust and the Apartheid regime in South Africa, formulating these experiences in abstracted legal terms. The suffering endured by the victims of these destructive systems has informed our understanding of these legal concepts. We needed the language to capture the distinctive type of brutality, to describe the totality of these experiences, to let the world know about the *particularity* of these catastrophes and draw universal lessons informed by these histories. The generic character of crimes against humanity, which rested on a theory of crimes against individuals, did not seem to be enough. Once again, a crucial point in recognizing these atrocities in the form of international crimes lay in the intrinsic value of recognition itself.[342]

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338. See William L.F. Felstiner, Richard L. Abel & Austin Sarat, The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . . , 15 Law & Soc'y Rev. 631, 635 (1981) ("Though hard to study empirically, naming may be the critical transformation; the level and kind of disputing in a society may turn more on what is initially perceived as an injury than on any later decision." (citations omitted)).

339. See generally UN Dept. of Pub. Info., The United Nations and Apartheid, 1948–1994 (1994), https://digitallibrary.un.org/record/198101/files/%5EST_%5EDPI_1568-EN.pdf [https://perma.cc/PM8U-72XY] (tracing the development of apartheid as a cognizable crime and its recognition by the United Nations); John Dugard, Convention on the Suppression and Punishment of the Crime of Apartheid, UN Audiovisual Libr. of Int'l L. (Nov. 30, 1973), https://legal.un.org/avl/pdf/ha/cspca/cspca_e.pdf (on file with the *Columbia Law Review*) (similar).

340. In 1966, the General Assembly adopted Resolution 2202, declaring apartheid as a crime against humanity. G.A. Res. 2202 (XXI), at 20 (Dec. 16, 1966). The adoption of the 1973 Apartheid Convention reflected this understanding. See Ronald Slye, Apartheid as a Crime Against Humanity: A Submission to the South African Truth and Reconciliation Commission, 20 Mich. J. Int'l L. 267, 292–93 (1999). In 1984, the Security Council adopted Resolution 556 and reinforced this determination. S.C. Res. 556, ¶ 1–4 (Oct. 23, 1984). The Rome Statute of the International Criminal Court classifies apartheid under Article 7, which is dedicated to crimes against humanity. Rome Statute of the International Criminal Court art. 7, § 2, July 17, 1998, 2187 U.N.T.S. 38544.

341. Audie Klotz, Norms in International Relations: The Struggle Against Apartheid, 39–55 (1995).

342. Bloxham shows that the Allies' policy during the Nuremberg trials avoided recognizing the racial character of the crimes. Bloxham, supra note 335, at 57 ("The scale and extremity of Nazi genocide occasionally forced recognition of 'race'-specific crimes, but at no time were the underlying principles of Allied policy reconsidered. The overall effect

Genocide, apartheid, and crimes against humanity are clearly not mutually exclusive concepts. Is it not evidently valid to state that the Nazi regime also implemented a regime of apartheid against the Jewish people, separating and concentrating them in confined areas of mass slaughter? Is it not also valid to argue that apartheid is a form of genocide?[343] It is even more unremarkable to assert that both apartheid and genocide are specific forms of crimes against humanity. Nevertheless, the international community has recognized the value in assigning distinctive names to these atrocities and distinguishing them analytically under the umbrella of crimes against humanity. The recognition of the abominable character of these systems was not only an act of generating law to regulate the future but also, crucially, an act of generating law to reckon with the present. Legal recognition was needed to bring about closure—including reparations—to the victims of these systems.

Against this background, this Article contends that Nakba, as embodied in the case of Palestine, should be recognized as an independent modality of crimes against humanity—one that is distinct enough from both apartheid and genocide to warrant individual recognition, while overlapping with these legal definitions at various points in time. Nakba, apartheid, and genocide are not exclusive frameworks that stand at odds with each other but rather make certain types of violence more salient in each case.

This Article also suggests thinking about genocide, apartheid, and Nakba as three concepts that together form a triangle of group crimes that correspond with three distinguishable modalities of settler colonialism's "logic of elimination."[344] Recent history has witnessed a range of successful, less successful, and failed settler-colonial projects. For instance, the United States or Canada are strikingly different cases from South Africa, which is, in turn, different from Palestine, Ireland, or Algeria. The logic of the settler colonists might have been similar, but the manifestation of the settler-colonial project has in effect mutated through its contact with the colonized groups.

Though settler colonialism has certainly practiced genocidal violence, the term "genocide" remains analytically independent from settler

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was that crimes against Jews were subsumed within the general Nazi policies of repression and persecution.").

343. See, e.g., Victor Kattan & Gerhard Kemp, Apartheid as a Form of Genocide: Reflections on South Africa v Israel, Eur. J. Int'l L.: Talk! (Jan. 25, 2024), https://www.ejiltalk.org/apartheid-as-a-form-of-genocide-reflections-on-south-africa-v-israel/ [https://perma.cc/H5DA-QAFW] (discussing the interplay between apartheid and genocide within South Africa's case against Israel at the ICJ).

344. See Wolfe, Elimination of the Native, supra note 140 at 387 (arguing that although "the settler-colonial logic of elimination has manifested as genocidal" in some cases, these terms "should be distinguished"); see also John Docker, Are Settler-Colonies Inherently Genocidal? Re-reading Lemkin, *in* Empire, Colony, Genocide, supra note 140, at 81, 81–83 (highlighting Lemkin's "multifaceted analyses of settler colonial histories *in relation to* genocide" (emphasis added)).

colonialism.[345] In fact, "genocide" was coined to name atrocities committed within and against Europe.[346] Similarly, although apartheid originated from a settler-colonial setting, the codified legal articulations of apartheid have largely reflected a liberal interpretation of the term and have abandoned colonialism as a necessary element for the crime.[347] One can arguably speak today of apartheid and genocide as concepts that are independent of settler colonialism.

Should the legal articulation of Nakba entail a future transformation into, simply, "nakba" as a common noun? Should Nakba then transcend its settler-colonial origins? What cases might then qualify for a Nakba analogy? Might we understand the Armenian displacement from Artsakh as a Nakba?[348] Might scholars understand an Indian implementation of the "Israel model"[349] in Kashmir as a Nakba? Or perhaps we should invoke the

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345. As Wolfe notes, "Settler colonialism is inherently eliminatory but not invariably genocidal." Wolfe, Elimination of the Native, supra note 140, at 387; see also Raymond Evans, "Crime Without a Name": Colonialism and the Case for "Indigenocide," *in* Empire, Colony, Genocide, supra note 140, at 133, 141 (offering the term "indigenocide" as an "attempt to incorporate the cataclysmic impact of settler colonialism upon host cultures, particularly the lethal effects of imperial migration, intrusion, and land seizure").

346. Aimé Césaire argued that what was exceptional about the Holocaust was "not the crime in itself, the crime against man" or "the humiliation of man as such" but rather "the crime against the white man, the humiliation of the white man" and the application "to Europe [of] colonialist procedures which until then had been reserved exclusively for" the indigenous communities of color in Algeria, India, and Africa. See Aimé Césaire, Discourse on Colonialism 36 (Joan Pinkham trans., 2000) (emphasis omitted). Césaire's argument goes hand in hand with the understanding that Jews in Europe were clearly racialized as an inferior "other" and excluded from the racial construct of whiteness. See, e.g., Jean-Paul Sartre, Anti-Semite and Jew 48 (1944) ("In a word, the Jew is perfectly assimilable by modern nations, but he is to be defined as one whom these nations do not wish to assimilate."). Sartre's commitment to Zionism, however, has alienated generations of Arab and decolonial intellectuals, especially after Israel's 1967 occupation of Arab lands. See generally Houria Bouteldja, Whites, Jews, and Us: Toward a Politics of Revolutionary Love (2016); Yoav Di-Capua, No Exit: Arab Existentialism, Jean-Paul Sartre, and Decolonization (2018); Edward Said, My Encounter With Sartre, 22 London Rev. Books, June 1, 2000, https://www.lrb.co.uk/the-paper/v22/n11/edward-said/diary [https://perma.cc/Q9GE-7K3Z]; Reda Merida, Opinion, On Jean-Paul Sartre and Palestine, Middle E. Eye (May 20, 2020), https://www.middleeasteye.net/opinion/jean-paul-sartre-and-palestine [https://perma.cc/U4CQ-RQFY].

347. See, e.g., Noura Erakat & John Reynolds, Understanding Apartheid, Jewish Currents (Nov. 1, 2022), https://jewishcurrents.org/understanding-apartheid [https://perma.cc/JX9K-3F67] ("[T]he International Criminal Court's 1998 definition [of apartheid] . . . subtly backed away from the anti-colonial core of the UN's 1973 Convention. The ICC definition . . . ties it more narrowly to the perpetration of crimes against humanity, stripping away the emphasis on its entanglement with settler colonialism . . . .").

348. E.g., Sébastien Gray, UN Reports Between 50–1,000 Armenians Remain Within Artsakh, 99% of Population Gone, Atlas News (Oct. 4, 2023), https://theatlasnews.co/conflict/2023/10/04/un-reports-between-50-1000-armenians-remain-within-artsakh-99-of-population-gone/ [https://perma.cc/36J8-RKJJ] (last modified Jan. 22, 2024).

349. See, e.g., Anger Over India's Diplomat Calling for 'Israel Model' in Kashmir, Al Jazeera (Nov. 28, 2019), https://www.aljazeera.com/news/2019/11/28/anger-over-indias-diplomat-calling-for-israel-model-in-kashmir [https://perma.cc/AD7Y-2QTT] (highlighting comments

concept of Nakba in relation to the Trail of Tears[350] and the decimation of Native nations in North America?[351] Should scholars understand the denial of the Sahrawi people's right to self-determination[352]—or perhaps Russia's potentially indefinite occupation of Ukrainian territory[353]—as a Nakba? Must all components of Nakba—foundation, structure, and purpose—be fulfilled for a case to qualify for that category? Or should the legal formulation of the crime broaden its application to cases that correspond with only some of these elements?

This Article leaves these questions open. The value of recognizing the Nakba does not necessarily lie in its generalizability, although generalizability is a natural byproduct of codification. Importing the concept of Nakba to other contexts is ultimately the decision of those who inhabit the crushing violence of those contexts. Nonetheless, the colossal violence of

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from India's consul general in New York that called Israel "a model in the world" (internal quotation marks omitted) (quoting India's Consul General in New York, Sandeep Chakravorty)).

350. The Trail of Tears was the U.S. government's mid-nineteenth century "forced removal of the Cherokee, Muscogee (Creek) Nation, Seminole, Chickasaw, Choctaw and other Native American nations." E.g., This Day in History: May 23, 1838: The Trail of Tears Began, Zinn Educ. Project, https://www.zinnedproject.org/news/tdih/trail-of-tears/ [https://perma.cc/5FV6-W3ZH] (last visited Apr. 13, 2024). It is widely considered "a land theft, massacre, and attempted genocide." See id.

351. "When European settlers arrived in the Americas, historians estimate there were over 10 million Native Americans living there. By 1900, their estimated population was under 300,000. Native Americans were subjected to many different forms of violence, all with the intention of destroying the community." Genocide of Indigenous Peoples, Holocaust Museum Hous., https://hmh.org/library/research/genocide-of-indigenous-peoples-guide/ [https://perma.cc/44BG-ZA2R] (last visited Apr. 13, 2024).

352. The ICJ has recognized the Sahrawi people's right to self-determination in its advisory opinion of 1975. See Western Sahara, Advisory Opinion, 1975 I.C.J. 58, ¶ 162 (Oct. 16) (concluding that "the Court has not found legal ties . . . [that] might affect the application of resolution 1514 (XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory"). However, Morocco has since occupied and annexed the majority of Western Sahara's territory. See Omar Yousef Shehabi, No Alternative to Despair? Sahrawis, Palestinians, and the International Law of Nationalism, Palestine Y.B. Int'l L., 2022, at 53, 57 (noting "Morocco's occupation and annexation of Western Sahara" where "the process of decolonizing a European colonial territory abruptly became a South-South conflict, with the 'liberation' of Western Sahara forming part of Morocco's own decolonization narrative"). In 2020, the Trump Administration recognized Morocco's claims over Western Sahara, a move that has been described as a "quid pro quo" for Morocco's normalization of relations with Israel. See Jacob Mundy, The U.S. Recognized Moroccan Sovereignty Over the Disputed Western Sahara. Here's What That Means., Wash. Post (Dec. 11, 2020), https://www.washingtonpost.com/politics/2020/12/11/us-recognized-moroccan-sovereignty-over-disputed-western-sahara-heres-what-that-means/ (on file with the *Columbia Law Review*).

353. Military Occupation of Ukraine by Russia, Rule of L. in Armed Conflicts Project, Geneva Acad. Int'l Humanitarian L. & Hum. Rts., https://www.rulac.org/browse/conflicts/military-occupation-of-ukraine [https://perma.cc/P4V7-EQP3] (last updated Jan. 12, 2023) (noting that Russia has been occupying Crimea since March 2014 and "large territories in the south and the east of Ukraine since February 2022").

the ongoing Nakba provides a rich reference point that may lend itself to a variety of analogies and open the door for highlighting different facets of oppression.

1. *Foundation.* — For each calamity, there is a foundational violence at its core. For each system of domination, a distinctive type of pain. The terms in our vocabulary are inevitably associated with archetypal cases that inform the inception of these concepts. The words and the imagery associated with them thus become signifiers of certain ideas that correspond with a foundational violence defining the core of each concept.[354]

As much as "apartheid" is associated with racial segregation in South Africa, the term "genocide" is associated with the annihilation of Jews during the Holocaust. If the imageries of apartheid are those of petty apartheid, like a "White Area" sign marking the system of racial segregation, the imageries of the Holocaust are those of concentration camps and gas chambers, signifying the system of extermination. Clearly, then, the United States, for example, has also enforced a system equivalent to apartheid against Black people,[355] and Germany also committed genocide in Namibia against the Herero and Nama people in the early twentieth century.[356] And

354. The idea of language as a system of signs—namely, sound–image signifiers and signified concepts—is expounded in Ferdinand de Saussure, Nature of the Linguistic Sign, *in* Course in General Linguistics 65 (Roy Harris trans., 1972). This Article draws on de Saussure to juxtapose the Nakba, apartheid, and genocide as signifiers of different foundational violence and ideological underpinnings.

355. For works applying the apartheid frame in the U.S. context, see, e.g., Douglas S. Massey & Nancy A. Denton, American Apartheid: Segregation and the Making of the Underclass 15–16 (1993) ("The segregation of American [B]lacks was no historical accident . . . . Although America's apartheid may not be rooted in the legal strictures of its South African relative, it is no less effective in perpetuating racial inequality . . . ."); Harriet A. Washington, Medical Apartheid: The Dark History of Medical Experimentation on Black Americans From Colonial Times to the Present 20 (2006) ("The much bewailed racial health gap is not a gap, but a chasm wider and deeper than a mass grave. This gulf has riven our nation so dramatically that it appears as if we were considering the health profiles of people in two different countries—a medical *apartheid*."). Despite the invocation of apartheid in the American context, the ongoing subjugation of Black people in the United States has often been theorized and understood on its own terms, without neglecting the interconnected nature of transnational systems of oppression. See generally Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness 11 (2010) (arguing that "mass incarceration is, metaphorically, the New Jim Crow").

356. See Philip Oltermann, Germany Agrees to Pay Namibia €1.1bn Over Historical Herero-Nama Genocide, The Guardian (May 28, 2021), https://www.theguardian.com/world/2021/may/28/germany-agrees-to-pay-namibia-11bn-over-historical-herero-nama-genocide [https://perma.cc/XRH3-YQRR]; see also Jeremy Sarkin, Colonial Genocide and Reparations Claims in the 21st Century 1 (2009) (noting that "today there is a growing acceptance that colonial abuses may have belated legal implications, and that some of the colonizers' actions do not merely retrospectively qualify as violations but were already violations under the laws of that time"); Zoé Samudzi, Looting the Archive: German Genocide and Incarcerated Skulls, 19 Soc. & Health Scis. 1, 1 (2021) ("The recent discourses and actions around the material remnants of colonial genocide demand historical contextualisation.").

yet, South African apartheid and the Holocaust became the paradigmatic cases that yielded the legal recognition of these concepts.[357]

The foundational violence of apartheid and genocide has defined the understanding of these concepts in global and legal consciousnesses. While the term "genocide" signifies the annihilation of a group,[358] the word "apartheid" signifies policies of segregation, especially ones enacted along racial lines.[359] Though these terms' legal definitions overlap, the foundational violence that lies at the core of these crimes is different and informs their respective meanings.[360]

Put simply, annihilation is the foundational violence of genocide, and segregation is the foundational violence of apartheid, although these concepts are not limited to their foundational violence.[361] What then is the

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357. See supra text accompanying notes 238–239 (describing the association of apartheid with South Africa); supra text accompanying note 284 (describing the prevalence of the Nazi paradigm associated with genocide).

358. See Convention on the Prevention and Punishment of the Crime of Genocide, supra note 276, at art. II ("[G]enocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group . . . .").

359. See International Convention on the Suppression and Punishment of the Crime of Apartheid, supra note 241, at art. I ("[A]partheid is a crime against humanity and . . . inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination . . . are crimes violating the principles of international law . . . .").

The term "racial" in the international legal corpus has been defined expansively. Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) states:

> [T]he term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

G.A. Res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination, art I (Dec. 21, 1965).

360. Articles II(a)(i), II(a)(ii), and II(b) of the Apartheid Convention, for example, overlap with the language of articles II(a), II(b), and II(c) of the Genocide Convention, respectively. Compare International Convention on the Suppression and Punishment of the Crime of Apartheid, supra note 241, 1015 U.N.T.S. at 245 (describing as mechanisms of apartheid "murder of members of a racial group or groups," "infliction upon the members of a racial group or groups of serious bodily or mental harm," and "deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part"), with Convention on the Prevention and Punishment of the Crime of Genocide, supra note 276, 78 U.N.T.S. at 280 (describing as mechanisms of genocide "[k]illing members of the group," "[c]ausing serious bodily or mental harm to members of the group," and "[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part"); see also Kattan & Kemp, supra note 343 (discussing the interplay and overlap between the Apartheid and Genocide Conventions).

361. The suffix "-cide" in the term "genocide," meaning "the act of killing" in Latin, reflects this foundational violence of annihilation. Genocide's intentional element, requiring intent to "destroy" the group, further builds on this foundational conception. The Apartheid Convention

foundational violence of Nakba? Juxtaposing these terms allows us to refine the meaning of each concept. Reducing these concepts to a unifocal understanding—that of their signifiers—reveals their distinctive nature, and their juxtaposition elucidates their analytical independence.

If the endpoint of genocide leaves the entire group exterminated, and that of apartheid leaves the entire group segregated, then the endpoint of the Nakba leaves the entire group displaced. If genocide dominates by annihilation, and apartheid dominates by segregation, then the Nakba dominates by displacement. The Arabic words denoting uprooting and displacement are central to the constitutive pain, humiliation, and experience of the 1948 Nakba and its aftermath.[362] By its very nature, forced displacement implies dispossessing people from their home, land, and property.

The symbols of the Nakba have thus become those of dispossession and refugeehood: preserved keys of stolen homes and tent camps of eternal waiting. Though displacement is the Nakba's *foundational* violence, the timeframe that produced the 1948 Nakba still included other grave manifestations of violence, such as massacres, killings, rape, imprisonment, and torture. Still, these forms are concomitant to the theme of displacement that defines the constitutive experience of the Nakba.

Inversely, the foundational violence inflicted on the victims of genocide and apartheid reflects a foundational feature of the ideologies that underpin both crimes. As much as the Holocaust was underpinned by a genocidal Nazi ideology, and apartheid by a segregationist ideology of Afrikaner nationalism,[363] the Nakba was underpinned by the ideology of Zionism, taking "transfer" as its "logic of elimination."[364]

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similarly reflects apartheid's foundational violence of racial segregation by referring to "the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination" in both article 1 and article 2. See Convention on the Prevention and Punishment of the Crime of Genocide, supra note 276, 78 U.N.T.S. at 280.

362. Professor Samera Esmeir encourages us to look to the vocabulary depicting the 1948 Nakba "if we wish to diagnose the danger ahead" (author's translation). See Samera Esmeir, Irshādat Ghazzah: 'an Nihāyah alḥukm ali'sti'māry [Gaza Instructions: The End of Colonial Government], Majallat al-Dirasat al-Filastiyniyya [J. Palestine Stud.], Winter 2024, at 27, 32 (highlighting the words "الاقتلاع (ali'qtilā', meaning "uprooting"), الترحيل (altarhīyl, meaning "driving out"), التهجير (altahjīyr, meaning "displacement"), التشريد (altashrīyd, meaning "expulsion")" (author's translation)).

363. On the ideological development of segregationist ideology in South Africa, see Saul Dubow, Racial Segregation and the Origins of Apartheid in South Africa, 1919–36, at 21–51 (1989) (studying the development of segregationist ideology between 1900–1936); Hermann Giliomee, The Making of the Apartheid Plan, 1929–1948, 29 J. S. Afr. Stud. 373, 376 (2003) (tracing the "the development and dissemination of apartheid as the operational ideology of Afrikaner nationalism").

364. Wolfe, Elimination of the Native, supra note 140, at 387, 392; see also supra section I.B. Wolfe refers to the "murderous activities of the frontier" in the settler colony of the United States as its "principal means of expansion." See Wolfe, Elimination of the Native, supra note 140, at 392. Similarly, one can understand displacement as the Nakba's principal means of expansion. Veracini has expanded on Nur Masalha's concept of transfer and positioned it at the center of his characterization of settler colonialism. See Lorenzo

Insights from settler-colonial theory further inform our understanding of Nakba in this context. Nakba is *not* a process of displacement for the sake of displacement but rather a process of displacement for the sake of *re*placement. Nakba displaces an existing group to settle a different one. As Wolfe famously put it, "settler colonizers come to stay: invasion is a structure not an event."[365] The material space—the land, the home, the territory, the *place*—is thus at the center of this process (dis*place*ment/re*place*ment). Nakba displaces a group and breaks up the territorial integrity of their homeland to settle a different group and create a new homeland on its ruins.[366] For Palestinians, however, displacement has never entailed a full process of assimilation and emancipation elsewhere, and the Palestinian struggle for their homeland persists.[367] Displacement has become an indefinite condition of *mis*placement, one that continues to deny the group their right to self-determination.

For now, it is sufficient to ask what the foundational violence means for the purpose of a legal notion of the Nakba. If displacement is Nakba's foundational violence, then partition, conquest, and ethnic cleansing are the umbrella concepts that allow us to examine the Nakba's foundational crimes and legal questions.[368] While the concepts of partition and conquest allow us to assess the legality of both the UN Partition Plan and

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Veracini, Settler Colonialism: A Theoretical Overview 33 (2010). While plausible, this interpretive move broadens the analytical frame of "transfer" at the risk of compromising its ability to capture the different dynamics and nuances between different types of transfer. Similarly, one may broaden the idea of "elimination" to encompass a variety of concepts. These broad understandings of elimination or transfer are not only counterintuitive to cases where elimination or transfer had practically failed but also compromise nuance that allows us to better understand the divergence between different settler-colonial settings. See Jasbir Puar, The Right to Maim: Debility, Capacity, Disability 144 (2017) ("The understanding of maiming as a specific aim of biopolitics tests the framing of settler colonialism as a project of elimination of the indigenous through either genocide or assimilation.").

365. Wolfe, Structure and Event, supra note 140, at 388.

366. See infra section III.B.3.

367. As the Palestinian poet Mahmoud Darwish put it: "But the Nakba-makers have not managed to break the will of the Palestinian people or efface their national identity – not by displacement, not by massacres, not by the transformation of illusion into reality or by the falsification of history." Darwish, supra note 319.

368. Both conquest and ethnic cleansing are unlawful under international law, although they are not defined as crimes under these names. The crimes associated with each concept may vary and include annexation as a form of aggression, forcible transfer as a crime against humanity, and other war crimes. See, e.g., Korman, supra note 119, at 133 (describing how "the legal prohibition of the use of force by states . . . has rendered conquest, or the forcible acquisition of territory, no longer a valid mode of acquisition of title"); Ethnic Cleansing, UN Off. on Genocide Prevention & Resp. to Prot., https://www.un.org/en/genocideprevention/ethnic-cleansing.shtml [https://perma.cc/268L-NCPN] (noting that the mechanisms used to carry out ethnic cleansing can "constitute crimes against humanity," "can be assimilated to specific war crimes," and "could also fall within the meaning of the Genocide Convention" (internal quotation marks omitted) (quoting a UN Commission of Experts report)).

Israel's subsequent proclamation of territory in Palestine, the concept of ethnic cleansing opens the door to consider the systematic depopulation, forcible transfer, massacres, and other violations committed against Palestinians.[369]

"Ethnic cleansing," a term that emerged in popular and legal consciousness in relation to the 1990s atrocities in the former Yugoslavia,[370] has often been understood as "rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area."[371] Although the invocation of ethnic cleansing against the background of the Yugoslav Wars has often been associated with genocide, it has grown into an analytically independent concept.[372] Tempting as it is to subscribe to the frame of ethnic cleansing to describe the foundational violence of the Nakba, it is important to note that ethnic cleansing does not necessarily include partition or conquest.[373]

These distinctions are not a matter of semantics but rather an attempt to identify and elucidate the core legal questions that pertain to the ongoing Palestinian condition.[374] The 1948 Nakba was not merely a

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369. Ilan Pappe has been the leading figure in popularizing the application of the ethnic cleansing paradigm to Palestine. Pappe defines ethnic cleansing as the "expulsion by force in order to homogenise the ethnically mixed population of a particular region or territory" and shows with great detail how Zionist forces carried out the ethnic cleansing of Palestine. See Pappe, Ethnic Cleansing, supra note 21, at 2. The framework of the Nakba does not stand in tension with Pappe's analysis but rather complements it.

370. See generally Steven Béla Várdy & T. Hunt Tooley, Introduction: Ethnic Cleansing in History, *in* Ethnic Cleansing in Twentieth-Century Europe 1, 7 (Steven Béla Várdy & T. Hunt Tooley eds., 2003) ("The most recent manifestations of ethnic cleansing . . . were cases which were experienced recently by the former Yugoslav provinces of Bosnia and Kosovo. These were the actions that popularized the expression 'ethnic cleansing.'").

371. U.N. Secretary-General, Letter dated May 24, 1994 from Secretary-General Boutros Boutros-Ghali addressed to the President of the Security Council, ¶ 129, U.N. Doc. S/1994/674 (May 27, 1994).

372. Compare Catherine A. MacKinnon, Rape, Genocide and Women's Human Rights, 17 Harv. Women's L.J. 5, 8 (1994) (asserting that "'[e]thnic cleansing' is a euphemism for genocide"), with Klejda Mulaj, Ethnic Cleansing in the Former Yugoslavia in the 1990s: A Euphemism for Genocide?, *in* Ethnic Cleansing in Twentieth-Century Europe, supra note 370, at 693, 711 ("The interchangeable use of the terms genocide and ethnic cleansing does not render justice to either term . . . ."); Drazen Petrovic, Ethnic Cleansing—An Attempt at Methodology, 5 Eur. J. Int'l L. 342, 354–59 (1994) (arguing that ethnic cleansing can, but does not necessarily, constitute genocide); Schabas, Ethnic Cleansing, supra note 186, at 42 (showing that while "genocide" is a legal term, "ethnic cleansing" was a popular term innovated to describe the acts committed in Yugoslavia).

373. Ethnic cleansing describes a systematic policy applied to a group in a certain territory, and as such it may occur against a minority group in a territorially defined nation-state. See, e.g., Petrovic, supra note 372, at 351.

374. See James Crawford, The Creation of States in International Law 421 (2d ed. 2006) ("The creation of the State of Israel in 1948 to 1949 presents a perplexing and important instance of international legal arguments adduced for and against the existence of States, initially Israel, subsequently Palestine."). These questions include different aspects pertaining to the legality of the British Mandate, the legality of UN Resolution 181(II), the right of self-determination, and the legal basis upon which Israel declared its independence. Id. at 421–48.

process of homogenizing the territory along ethnonational lines—it also conjoined ethnic cleansing with a process of colonization, partition, and an act of conquest to establish a nation-state in that territory and redefine its boundaries.[375] And regardless of the legality of the Partition Plan to begin with,[376] the establishment of the State of Israel clearly did not abide by that plan;[377] Israel instead claimed vast swaths of territory beyond its demarcated boundaries through conquest and annexation.[378] As Dr. Victor Kattan notes, "there was simply no other way Israel could obtain title over Palestine other than to conquer it."[379] The foundational legal questions stemming from this reality have thus been truly resolved.[380]

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375. See Esmeir, supra note 362, at 31–32 ("The notion of ethnic cleansing is not entirely accurate [in relation to Palestine] because the Palestinian tie to the land, and the collective existence that this tie allows, and not their ethnic belonging or their permanent collective identity, is what reinforces the brutality of settler colonialism against them [the Palestinians]." (author's translation)).

376. The legal assessment of partition is two-fold as it pertains to questions of *ultra vires* and self-determination. See Crawford, supra note 374, at 428–30. Whereas the question whether Resolution 181(II) was *ultra vires* is best analyzed as part of Nakba's foundation, the question of self-determination is best analyzed as part of Nakba's purpose. See infra note 412 and accompanying text.

377. Professor James Crawford concludes:

> [A]lthough the Israeli Declaration of Independence partly relied upon [the Partition Plan], Israel was not created either pursuant to an authoritative disposition of the territory, or to a valid and subsisting authorization. But even if [the Partition Plan] had constituted such a disposition or authorization, it would have been difficult to argue that the creation of Israel occurred in compliance with it. At the time of the ceasefire Israel extended over substantially greater territory than that accorded it by the Partition Resolution. It was not created in the manner there laid down, and it did not comply with the prescribed conditions for protection of minorities, etc. . . . Israel was created without the consent of any previous sovereign and without complying with any valid act of disposition.

See Crawford, supra note 374, at 432 (footnote omitted); see also Kattan, supra note 119, at 240–45 (discussing Israel's noncompliance with the Partition Plan and with other pillars of international law); John Quigley, The Legality of a Jewish State: A Century of Debate Over Rights in Palestine 3–6 (2021) [hereinafter Quigley, Legality of a Jewish State] (describing the 1940s legal battle over Israel's legitimacy).

378. Kattan, supra note 119, at 232–47 ("The *Yishuv* accomplished [the domination of Palestine] through war, occupation and annexation after which the Provisional Government of Israel extended its administration and laws there.").

379. Id. at 241. Kattan rules out the four other methods of acquiring territorial sovereignty recognized by international law: (1) accretion; (2) cession; (3) occupation of terra nullius; and (4) prescription. See Kattan, supra note 119, at 78. But see Crawford, supra note 374, at 433 ("Secession would thus appear to be the appropriate mode, and the question then becomes [when] Israel qualified as a seceding State . . . . Israel must be considered to have met that standard [of secessionary independence] by [February 24, 1949], when the Egyptian-Israel Armistice Agreement was signed.").

380. See supra note 379; see also Imseis, United Nations and the Question of Palestine, supra note 29, at 52–109 (examining the legality of Resolution 181(II) and arguing that "the resolution was neither procedurally ultra vires the General Assembly, nor was it substantively consistent with prevailing international law as regards the self-determination of peoples"

This Article posits that the breakdown of the legal concept of Nakba into foundation, structure, and purpose is crucial if one is to understand and structure the legal questions at play. The formulation of Nakba's foundational element in law requires an understanding of the concept of ethnic cleansing in conjunction with that of partition and conquest. This nuanced understanding is especially important because the 1948 Nakba not only "cleansed" an ethnonational population from a territory but also divided, conquered, and entirely redefined both the group's organization and the territory's political and administrative demarcations by force.[381]

Also, "ethnic cleansing" is an accurate term only insofar as the positionality of the *cleanser*—the one performing the act of "cleansing"—is concerned. It does not tell us much about what happens to those *cleansed* or what structures of violence they become trapped in. Inversely, as a conceptual term, "ethnic cleansing" does not tell us much about what happens to those who are *not* cleansed, or perhaps not cleansed *yet*. Indeed, the victims and potential victims of ethnic cleansing are reduced to the fantasies of their victimizers. Once subjected to ethnic cleansing, they disappear beyond the purview of the paradigm; they cease to exist in time or space and simply become a "refugee problem."[382]

The ongoing Nakba is premised on a broader anatomy—one that includes conquest, fragmentation, and denial of self-determination—although its foundational violence overlaps with ethnic cleansing, and ethnic cleansing is a feature of the structure that underpins the ongoing Nakba. Once placed within the Nakba's foundational element, the concepts of partition, conquest, and ethnic cleansing become legible as part of a broader framework that includes a structure and purpose.

2. *Structure.* — The seismic rupture in the fabric of society following the foundational violence of displacement creates a fracture, one that fragments the group into at least two parts: those who remained under the new regime and those who were made refugees. Preventing refugees from returning to their homes is central to stabilizing the new regime, which transforms displacement into a permanent state of exile and maintains the demographic composition to favor the settler society.

(emphasis omitted)); Quigley, Legality of a Jewish State, supra note 377, at 3–6 (examining legal questions stemming from the British Mandate and the establishment of the State of Israel and noting that "[t]he question of the legality of Israel . . . has persisted"); Ronen, Schrödinger's Occupation, supra note 196, at 146 (examining the application of the law of occupation in Jerusalem in 1948–1949 and concluding that "[t]hroughout its existence, Israel's conduct was characterized by gradual transformations of fortuitous factual situations into claims of entitlement"); Yuval Shany, Legal Entitlements, Changing Circumstances and Intertemporality: A Comment On the Creation of Israel and the Status of Palestine, 49 Isr. L. Rev. 391, 392 (2016) (offering a "critical assessment of some of the legal conclusions" of Professor James Crawford pertaining to "the creation of Israel").

381. See Crawford, supra note 377, at 433 (discussing the fracturing of Palestinian territory and self-determination during the 1948 Nakba).

382. Pappe, Ethnic Cleansing, supra note 36, at 2 ("The end result of such acts is the creation of a refugee problem.").

Committing a Nakba, then, does not mean succeeding in displacing the entire group, as much as committing a genocide does not mean the full and absolute annihilation of the entire group. Since the Nakba is not only an event of displacement but an ongoing process of replacement, it undergoes a metamorphosis that shapes its foundational violence into a structure of domination. The rise of what may be called a "Nakba regime" is thus not contingent upon the displacement of an entire group from their land, but rather upon the successful conquest of some portion of a territory, the displacement of a sizable portion of the group from that territory, and the erection of a new regime dominated by the settler society in that territory. The foundational violence of displacement is thus of *transitional* character in that it transforms Nakba from an event of spectacular violence into a regime of domination.

But what defines a Nakba regime? What are the conditions experienced by the group(s) under such a regime? What happens to those who remain, and what happens to those displaced? Theorizing the structure of Nakba must account for the pivotal bifurcation of the group and its dispersal across fragmented geographies and legal statuses. Examining the removal of the Choctaw Nation, Wolfe concludes that what distinguished "the removing Choctaw from those who stayed behind was collectivity. . . . [T]he Choctaw who stayed became individual proprietors, each to his own, of separately allotted fragments of what had previously been the tribal estate . . . . Without the tribe, though, for all practical purposes they were no longer Indians."[383] For Wolfe, the incorporation of those who managed to remain as citizens of the new settler polity constituted elimination by assimilation, or in Wolfe's terms, "[a] kind of death."[384]

Here, the Nakba framework stands in tension with the eliminatory determinism of the settler-colonial paradigm and invites us to think about what happens when collective elimination by settler-colonial projects—whether through annihilation, displacement, or assimilation—fails.[385] We must meditate on this liminal condition between liberation and elimination, because that is precisely where Nakba as an ongoing process lies. Since 1948, Palestinians have been fragmented but not eliminated, incorporated but not entirely assimilated, occupied but not vanquished, besieged but not defeated.[386]

The ongoing nature of Nakba is premised on the failure to sufficiently eliminate the group by the combination of methods that include ethnic

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383. Wolfe, Elimination of the Native, supra note 140, at 397.

384. Id.

385. See Rashid Khalidi, Israel: 'A Failed Settler-Colonial Project', Inst. for Palestine Stud. (May 10, 2018), https://www.palestine-studies.org/en/node/232079 [https://perma.cc/MQ7S-B23U].

386. Alaa Abd El-Fattah, Gaza: On Being Prisoner to Your Own Victory, *in* You Have Not Yet Been Defeated 94, 95–105 (A Collective trans., 2021).

cleansing, killing, dispossession, imprisonment, fragmentation, or assimilation. The persistence of the group thus frustrates and disrupts the stability of the Nakba regime and yet is also the pretext for its continued existence.[387] The Nakba regime therefore includes a system of domination, which may overlap with the crime of apartheid, as a central mode of governance applicable to those who remained. The military regime applied to govern Palestinians who remained in the 1949 armistice territories thus constitutes the genesis of this system, applied to manage the population who survived the 1948 Nakba and became incorporated into the new polity as citizens.[388]

And yet, what do we call the crime committed against those displaced beyond the territorial purview of the regime? How do we understand the injustice committed against those still languishing in refugee camps over seventy-five years later? Here, the analytical divergence of the Nakba regime from apartheid becomes clearer. The concept of "apartheid" presupposes a political community existing within a territorial unit that the system of racial segregation subjugates.[389] In contrast, the Nakba regime is one that is constituted by the exclusion of a group from the territorial terrain altogether. The permanent exclusion of those ousted from the territory provides a crucial reminder that Nakba is not only a regime of domination against those remaining in the territory but also a regime of subjugation by exclusion from the territory.

The aggregation of these internal and external counterparts constitutes the structure of a Nakba regime. Nakba may institute and stabilize a structure that is tantamount to the crime of apartheid, but its genesis remains rooted in the fragmentation of the group and the exclusion of people from the territory. As much as the 1948 Nakba fragmented the group through expulsion and imposed apartheidist policies against the Palestinians who became citizens of Israel, the 1967 Israeli occupation replicated this pattern of Nakba and apartheid, albeit on a different scale and in another form.[390] The structure of Nakba is

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387. See Erakat, Nakba Peace, supra note 326, at 6 (introducing the framework of "Nakba peace").

388. For a description of the military rule in the armistice territories, see supra note 9 and accompanying text.

389. Dubow's study highlights the emergence of South African apartheid from the segregationist policies in the first half of the twentieth century. See Dubow, supra note 363, at 1. Dubow writes, for example, that in this context, "[t]he adoption of segregation as a national political programme represented an attempt to systematise relations of authority and domination in a heterogenous society which had only recently been conquered and unified into a single state." Id. In contrast, the Nakba had broken up the British Mandate's administrative unit, partitioned the territory, and furnished Zionism as the regime's national program. See supra text accompanying notes 33–41.

390. This time, the foundational violence of Nakba extended not only to Palestinian territories but also to Syrian and Egyptian ones, having an especially devastating impact on those who used to live in the now-annexed Syrian Golan Heights. See Amnesty Int'l, Apartheid Against Palestinians, supra note 235, at 37 n.3 (describing the occupation of the

therefore best understood through the lens of fragmentation, namely, the modes of domination that Nakba has applied across time for each subgroup that it has produced. The Nakba regime is the totality of these modes of domination, each forming a laboratory of oppression.[391]

Nakba thus does not eliminate the group but dramatically alters its organization. If the settler-colonial structure is premised on elimination, and the apartheid structure on racial segregation, Nakba's structure is premised on fragmentation.[392] The foundational violence of Nakba fragments the group and radically rearranges the previous ordering of society, creating a matrix of converging and diverging logics, whereas dispossession and ethnic cleansing continue to feature as a central theme.[393]

The structure of fragmentation simultaneously asserts the dominance and unity of a new group that settles on the territory and establishes a new political regime.[394] It is in this sense that the groups may still be distinguished as native and settler, indicating their political positions in a

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Golan Heights). The displacement of populations during the 1967 occupation has further replicated the bifurcation between those who remained and those displaced, and once again applied a militarily enforced apartheid solution to the population that remained in the occupied territories. Id. Considering this structure in conjunction with the 1948 Nakba yields four different groups: (1) those displaced in 1948 and displaced in 1967; (2) those displaced in 1948 but remained in 1967; (3) those who remained in 1948 but displaced in 1967; and (4) those who remained in both 1948 and 1967. Those displaced in 1948 and occupied in 1967 have experienced two overlapping modes of domination: the ongoing exclusion from the territories occupied in 1948, and the extension of a militarily administered apartheid system to govern them in 1967. Id. at 76.

391. See supra note 15 and accompanying text (articulating "laboratories of oppression" as a foil to the Brandeisian concept of laboratories of democracy).

392. Scholars have articulated the centrality of fragmentation to the Palestinian experience. See Amahl Bishara, Crossing a Line: Laws, Violence, and Roadblocks to Palestinian Political Expression 8 (2022) ("[T]he primary engine of Palestinian fragmentation over the last seventy plus years has been Israeli settler colonialism."); Falk & Tilley, supra note 234, at 37–48 (reviewing the different legal statuses of different groups of Palestinians in and outside of Israel); Joshua Rickard, The Fragmentation of Palestine: Identity and Isolation Since the Second Intifada 3 (2022) (exploring the "physical fragmentation of the West Bank" and "the internal isolation between Palestinian communities that have resulted from political and social fragmentation"); Rinad Abdulla, Colonialism and Apartheid Against Fragmented Palestinians: Putting the Pieces Back Together, 5 State Crime J. 51, 57–64 (2016) (discussing the current fragmented state of Palestinian people across different geographic areas); Jamal Nabulsi, "To Stop the Earthquake": Palestine and the Settler Colonial Logic of Fragmentation, 56 Antipode 187, 188 (2024) [hereinafter Nabulsi, "To Stop the Earthquake"] ("Fragmentation is a long-standing colonial strategy to which Palestinians enact resistance."). For an interesting early study of the phenomenon, see generally Abraham Ashkenasi, Israeli Policies and Palestinian Fragmentation: Political and Social Impacts in Israel and Jerusalem (1988).

393. Eghbariah, Jewishness as Property, supra note 13.

394. Nabulsi, "To Stop the Earthquake", supra note 392, at 199 ("In fragmenting Palestine, the Zionist project seeks to render Israel a seamless entity. That is, the fragmentation of Palestine and Palestinians is coterminous with the production of the state of Israel and the Israeli people as a coherent whole.").

Nakba regime. The settler/native divide, however, is insufficient as a framework for the *legal* positionality of the natives under a system of fragmentation.[395] Once we recognize a Nakba regime, we can enhance our understanding of its structure and map the fragmentation it generates.

Fragmentation is instilled by exclusion and structured by law: drawing and enforcing boundaries—visible and invisible, material and legal—between territories and people. In Palestine, this structure has developed into a sophisticated legal regime that stratifies and classifies Palestinians under Israeli rule into different legal statuses, subjecting each subgroup to distinctive types of violence and differential access to fundamental rights.[396] Following the 1948 Nakba, the Palestinian collectivity was not only divided into those who remained and those who were displaced; the remaining group was trifurcated into territories that fell under Israeli, Jordanian, and Egyptian control.[397] Once considered against this background, it becomes clearer that apartheid overlaps with the Nakba regime but can hardly encompass its inception.[398]

Counterintuitively, perhaps, the 1967 Israeli occupation of the West Bank, the Gaza Strip, and East Jerusalem have brought about a peculiar condition of impaired unity by consolidating the entirety of historic Palestine under some form of Israeli control.[399] Nevertheless, the

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395. In this context, Professor Mahmood Mamdani identifies a tripartite structure of Palestinian existence: refugees, citizens of Israel, and residents of the West Bank and Gaza. Mahmood Mamdani, Neither Settler nor Native: The Making and Unmaking of Permanent Minorities 304 (2020) [hereinafter Mamdani, Neither Settler nor Native]. Mamdani invites us to reflect about this structure and asserts the lack of language to talk about it: "There is no single and universally accepted political terminology to identify these three groups—one expelled, one incorporated, one colonized and occupied." Id. Mamdani explains:

> The creation of the state of Israel in 1948 began a process that fractured the Palestinian people into three groups who have taken decades to recognize their collective interest in contesting the Israeli regime. One of these groups became refugees outside historical Palestine. The second comprised those who remained within the borders of the new state of Israel and became its second-class citizens. The third group, residents of the West Bank and Gaza, became citizens of Jordan and Egypt in 1948. In 1967 they were colonized by Israel and have lived under occupation ever since.

Id. While Mamdani observes this structure, his project is primarily concerned with transcending it toward a "nonnational state." This objective makes Mamdani skip the question of fragmentation too swiftly. Id. at 324.

396. Id. at 304; see also Falk & Tilley, supra note 234, at 37–48 (describing the different legal statuses of Palestinians and the rights associated with them).

397. Mamdani, Neither Settler nor Native, supra note 395, at 304.

398. See Falk & Tilley, supra note 234, at 37 ("[The] [f]ragmentation of the Palestinian people is indeed the core method through which Israel enforces apartheid.").

399. Journalist Amjad Iraqi argues in this context that "despite their physical dispersal, the Palestinian people have never been more connected." See Amjad Iraqi, Palestinian Resistance Tore Down the Green Line Long Ago, The Nation (Aug. 10, 2022), https://www.thenation.com/article/world/palestinian-resistance-green-line/ [https://perma.cc/XCQ4-STMA].

Palestinian population has remained governed by a system of legal fragmentation that has assigned different legal statuses to distinct subgroups.[400] In fact, the 1967 Israeli occupation deepened this fragmentation by annexing East Jerusalem and assigning a different legal status to its Palestinian residents.[401] Today, different identification cards stratify and classify Palestinians into at least five categories,[402] each with a distinct legal status: Palestinian citizens of Israel;[403] Palestinian residents of Jerusalem;

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400. Political scientist Menachem Klein argues in this context that "Israel operates a regime that includes and excludes the Palestinians under its rule via a graduated system of controls . . . in the entire area from Jordan to the Mediterranean." Menachem Klein, The Shift: Israel–Palestine From Border Struggle to Ethnic Conflict 19 (2010) [hereinafter Klein, The Shift]. While Klein identifies five distinct Palestinian groups that are subject to "differential levels of state supervision, security control, bureaucratic rules, civil rights and citizen benefits," id. at 96–108, he traces the emergence of this regime to the early 2000s and argues that "a single state . . . is the current problematic reality rather than a viable solution," id. at 3–7.

401. For an overview of the legal status of Palestinian residents of Jerusalem, see generally Ir Amim, Permanent Residency: A Temporary Status Set in Stone (2012), https://www.ir-amim.org.il/sites/default/files/permanent%20residency.pdf [https://perma.cc/K29U-T49G] ("Since 1967, Israel has treated the territory of East Jerusalem as if it were part of Israel—the territory but not the Palestinians living within its borders. . . . These residents are excluded from the political arena and are not entitled to full political rights."); Yaël Ronen, Toshavim, L'o Ezraḥim: Yisrael Ve'arviyey Mizrah Yerushalayim, 1967–2017 [Residents, Not Citizens: Israeli Policy Towards the Arabs in East Jerusalem], 1967–2017 (2017) (tracing the history of the unique "social and legal status of East Jerusalem Arabs" since the 1967 war); Danielle C. Jefferis, Institutionalizing Statelessness: The Revocation of Residency Rights of Palestinians in East Jerusalem, 24 Int'l J. Refugee L. 202 (2012) (identifying Israeli policies that "trap[]" Palestinian East Jerusalemites "in a fine limbo between permanent residency . . . and statelessness"); Nadera Shalhoub-Kevorkian, Trapped: The Violence of Exclusion in Jerusalem, Jerusalem Q., Spring 2012, at 6 (presenting findings from interviews with dozens of Palestinians living in Jerusalem about their experiences living under "Israeli policies of exclusion and discrimination").

402. For an exploration of the identification card regime within the territories under Israeli control, see generally Helga Tawil-Souri, Uneven Borders, Coloured (Im)mobilities: ID Cards in Palestine/Israel, 17 Geopolitics 153 (2012). Compare id. at 169 ("The very real threats hanging over Palestinians with green, orange or Jerusalem-blue ID cards [with color based on residency] symbolise . . . the enforced fragmentation of Palestinians from each other . . . and the determinative importance of an ID card as a border."), with Klein, The Shift, supra note 400, at 96–97 ("The fundamental and most visible division is the territorial/legal one that divides Palestinians into five groups: Israeli Palestinians; Jerusalem Palestinians; Palestinians who reside between the Security Barrier and the Green Line; Palestinians in the rest of the West Bank; and Gaza Strip Palestinians."). Klein's classifications, however, confuse *legal* fragmentation with strictly *territorial* fragmentation. While there is a strong correlation between the legal status assigned to individuals and the specific territorial fragment involved, this correlation does not imply synonymy.

403. From the outset, the category of "Israeliness" is not a meaningful unit of legal analysis since it is not recognized as a nationality even under Israeli law. See Masri, supra note 10, at 57–58. Israeli citizenship relies on a bifurcated structure that distinguishes nationality from citizenship. See id.; Tawil-Souri, supra note 402, at 159–60 (describing differences in official identification cards based on nationality and citizenship). Though both the Jewish and Palestinian communities in Israel are citizens of the state, they still hold legally distinguished nationalities. In CivA 8573/08 *Ornan v. Ministry of the Interior*, the Israeli Supreme Court reaffirmed its 1972 precedent *Tamrin v. State of Israel*, which held

Palestinian residents of the West Bank; Palestinian residents of the Gaza Strip; and Palestinian refugees (a category that contains various fragments itself).[404]

A comprehensive exploration of the legalities of this structure in Palestine remains beyond the scope of this Article, particularly since the above categories may still contain further fragmentation.[405] What is notable is not only that they provide a structure to the ongoing Nakba but that this structure is primarily a legal one. Central to the principle of fragmentation are limitations on upward legal mobility and legal restrictions on family life.[406] The structure is made and enforced by the constant classification of people and limitation of their upward mobility between legal classes.[407]

The Nakba regime is therefore best defined by its structure of fragmentation rather than by a singular form of violence it practices. Fragmentation brings into focus questions about not only the interplay between existing and changing legal statuses but also the ways in which these legalities influence processes of subjective and collective identity formation. Since the 1948 Nakba, Palestinian collective existence has continuously developed in this liminal space between unity and fragmentation.[408] Unity and fragmentation have not been static modes of collective existence but rather dialectical forces that forged Palestinian identity and

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that the self-description "Israeli" cannot be used in lieu of "Jewish" for the purposes of the population registry. See CivA 8573/08 Ornan v. Ministry of the Interior, 2013 Isr. L. Rep. 571, 599–600, 619, aff'g CivA 630/70 Tamrin v. State of Israel, 26(1) PD 197 (1972) (Isr.). In 2013, the *Ornan* Court held that the petitioners had failed to show that an "Israeli nation" that is distinct from the "Jewish nation" has formed in Israel since its earlier decision. Id. at 600, 604–05. For literature that explicates the legal status of Palestinian citizens of Israel, see supra note 10.

404. See Tawil-Souri, supra note 402, at 155–60.

405. Consider, for example, the fragmentation of the population across areas A, B, and C in the occupied West Bank as part of the 1995 Oslo II Accord; the fragmentation of the population of Gaza into north and south after the genocidal war; or the differentiated status of the refugee communities across Jordan, Lebanon, Syria, Gaza, the West Bank, and other locales.

406. See, e.g., Hassan Jabareen, How the Law of Return Creates One Legal Order in Palestine, 21 Theoretical Inquiries L. 459, 466–82 (2020) (detailing several case studies illustrating that "[s]ince 1948, the [Israeli] Supreme Court has denied the right of family unification to Palestinian citizens").

407. Even in the relatively rare cases in which Palestinian residents of Jerusalem apply for Israeli citizenship, Israel rejects the overwhelming majority of those requests for a variety of reasons, including social media posts "in memory of the Nakba." See Nir Hasson, East Jerusalem Resident Could Be Denied Citizenship Due to Posts Critical of Israel, Haaretz (Jan. 18, 2024), https://www.haaretz.com/israel-news/2024-01-18/ty-article/.premium/east-jerusalem-resident-could-be-denied-citizenship-due-to-posts-critical-of-israel/0000018d-1cf9-db77-ad9f-dffb40820000 (on file with the *Columbia Law Review*).

408. See Khalidi, Palestinian Identity, supra note 45, at 194 ("For in spite of their dispersion and fragmentation among several new successor states and forms of refugee status, what the Palestinians now shared was far greater than what separated them; all had been dispossessed, none were masters of their own fate . . . .").

nationalism itself.[409] It is true that fragmentation operates as a tool of intense domination under which Palestinians exist. But it is not *only* that: Fragmentation creates a collective consciousness that revolves around dispersion. Fragmentation becomes the shared collective experience that causes Palestinians to gravitate toward one another while simultaneously keeping them apart.[410]

The fragmented and multifocal nature of the ongoing Nakba is what makes it difficult to reduce to a monolithic framework. While one can explicate the nature of violence practiced against each fragment, the totality of this experience can only be captured through the concept of fragmentation itself. Recognizing the Nakba allows us to assemble the

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409. Reflecting on this trajectory against the backdrop of the then-ongoing Oslo negotiations, Khalidi concludes his 1996 book *Palestinian Identity* by wondering how this tension between unity and fragmentation would unfold across the Green Line should the Oslo Accords materialize. Khalidi leaves the readers with an open-ended question about how different groups of Palestinians will continue to relate to each other despite their radically different lived experiences:

> How will [Palestinian citizens of Israel] relate to their fellow-Palestinians in the West Bank and Gaza Strip once the final arrangements have been sorted out, and one lot are on one side of a final frontier and another on the other? One segment of Palestinians study Hebrew literature and Jewish history in school, carry Israeli passports and vote in Israeli elections; members of another are learning Arabic literature and Palestinian history, carry a bewildering array of travel documents or none at all, plus a new Palestinian passport whose value has yet to be tested, and voted in a Palestinian election. Yet both identify with the same national symbols . . . and both groups regard themselves and each other as Palestinians.

Id. at 207.

More than a decade later, Khalidi observes that a "new and deadly danger faces Palestinian identity today, one that was only dimly visible in the early to mid-1990s. This is the dual danger of the fragmentation of the remainder of the Palestinian homeland and of the unity of the Palestinian national movement." Id. at xxxii. According to Khalidi, this growing fragmentation involves not only "potentially lasting physical divisions between and within what remains of the imagined homeland of the would-be Palestinian state" but also "the profound and growing chasm between the two Palestinian 'Authorities': those of Fateh and Hamas." Id.

410. Compare Benedict Anderson, Imagined Communities: Reflections on the Origins and Spread of Nationalism 5–7 (rev. ed. 2006) (positing a definition of "nation" as "an imagined political community," one that is "imagined as both inherently limited and sovereign"), with Louis Hartz, The Founding of New Societies 11–12 (1964) ("Being part of a whole is psychologically tolerable, but being merely a part, isolated from a whole, is not. It is obvious that there is a major problem of self-definition inherent in the process of fragmentation. . . . [N]ew generations emerge within the fragment to whom it is, in sober truth, a 'nation.'"). The notion of fragmented nationalism may appear to stand at odds with certain currents of postcolonial literature that defend the "fragments" in the face of the totalizing nation. See Partha Chatterjee, The Nation and Its Fragments: Colonial and Postcolonial Histories 11–13 (1993) (identifying "numerous fragmented resistances to [the] normalizing project" of "nationalist modernity" and urging that explicating these "fragment[s]" can allow for the imagining of "new forms of the modern community . . . [and] state").

fragments by naming and codifying a variety of conditions into one legal framework. The permanence of fragmentation itself is the structural abstraction of the ongoing Nakba.

3. *Purpose.* — What purpose has the Nakba served, and what purpose does it continue to serve? For Zionism, the 1948 Nakba meant achieving the goal of national sovereignty in the form of a Jewish state in Palestine, and it is thus commonly referred to as the War of Independence. Clearly, this conception is correct only insofar as Zionist national aspirations are concerned. The flipside of this account, one that considers the Palestinian people, is that Zionist sovereignty has been committed to—and could only be achieved through—suppressing Palestinian self-determination. To make room for an exclusively Jewish state, Palestinians had to be minoritized and denied territorial integrity in Palestine, undermining a cornerstone of self-determination.

From the Balfour Declaration onwards, the legal order that the League of Nations had imposed on Palestine served to sideline and deny Palestinian self-determination in favor of Zionist aspirations. As Balfour himself noted:

> [I]n Palestine we do not propose even to go through the form of consulting the wishes of the present inhabitants of the country. . . . The four Great Powers are committed to Zionism. And Zionism, be it right or wrong, good or bad, is rooted in age-long traditions, in present needs, in future hopes, of far profounder import than the desires and prejudices of the 700,000 Arabs who now inhabit that ancient land.[411]

Palestine had thus been exceptionalized from other cases of colonial domination and treated as sui generis. The notion of partition, which the UN fashioned as a solution to terminate the British Mandate, further imposed an undemocratic regime on the Palestinian people[412]—one that ran counter to the very idea of self-determination.[413] The UN Partition

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411. Khalidi, Hundred Years' War, supra note 35, at 38 (omission in original) (internal quotation marks omitted) (quoting Memorandum from Arthur Balfour, Foreign Secretary, Respecting Syria, Palestine, and Mesopotamia (Aug. 11, 1919), *in* 4 Documents on British Foreign Policy, 1919–1939, at 340, 345 (E.L. Woodward & Rohan Butler eds., 1952)).

412. Professor Ardi Imseis captured these dynamics by referring to the UN's treatment of the Palestine Question as rule *by* law rather than rule *of* law. Imseis analyzed the various biases underpinning the UN Special Committee on Palestine (UNSCOP), the body that formulated and recommended the UN Partition Plan in 1947, showing how the "cynical use, abuse, [and] selective application of international legal norms . . . perpetuat[ed] inequity between hegemonic and subaltern actors on the system." Ardi Imseis, The United Nations Plan of Partition for Palestine Revisited: On the Origins of Palestine's International Legal Subalternity, 57 Stan. J. Int'l L. 1, 4 (2021).

413. See Imseis, United Nations and the Question of Palestine, supra note 29, at 257–58 (arguing that "[i]nternational legal subalternity finds sustained expression in the UN's prolonged management of the question of Palestine"); Quigley, Legality of a Jewish State, supra note 377, at 93–97 (describing how the wishes of Palestinian and Arab states were left out of UN processes relating to the formation of Israel); M.C. Bassiouni, "Self-Determination" and the Palestinians, 65 Am. Soc'y Int'l L. Proc. 31, 37 (1971) ("The

Plan granted fifty-six percent of Palestine's territory to the "Hebrew State" at a time when Jewish-owned lands did not exceed seven percent.[414] The UN Special Committee on Palestine (UNSCOP) majority opinion bluntly repeated Balfour's logic and reaffirmed the exclusion of Palestine from the right to self-determination:

> With regard to the principle of self-determination, although international recognition was extended to this principle . . . it was not applied to Palestine, obviously because of the intention to make possible the creation of the Jewish National Home there. Actually, it may well be said that the Jewish National Home and the *sui generis* Mandate for Palestine run counter to that principle.[415]

The 1948 Nakba emanating from this order, and the establishment of Israel during that process by the force of arms, created "facts on the ground" that prevented Palestinians from achieving self-determination and relegated them to a reality of indefinite displacement and fragmentation. The Israeli state has since continued to deny Palestinians self-determination not only within the 1949 armistice borders but also in the remaining Palestinian territories that Israel occupied in 1967. It is precisely this intention to deny Palestinians self-determination that led Israeli historian and scholar Baruch Kimmerling to refer to these developments as "politicide"—namely, the intention to "destroy the political and national viability of a whole community of people and thus deny [them] the possibility of genuine self-determination."[416]

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partition, in effect, foreclosed the Palestinians' right of self-determination by including in the category of 'people' eligible to exercise it, persons who did not qualify under the nationality criterion."); Cherif Bassiouni, Some Legal Aspects of the Arab-Israeli Conflict, *in* The Arab-Israeli Confrontation of June 1967: An Arab Perspective 91, 97 (Ibrahim Abu-Lughod ed., 1970) ("The then European majority control in the U.N. in the name of international law had unilaterally abrogated the Palestinians' right to self-determination—a tragic lesson in practical world politics."); Nabil Elaraby, Some Legal Implications of the 1947 Partition Resolution and the 1949 Armistice Agreements, 33 Law & Contemp. Probs. 97, 97 (1968) ("The fate of the Palestinians was decided for them by the United Nations, to their detriment, without reference to the rule of law."); Wilde, Tears of the Olive Trees, supra note 207, at 412–14 (explaining contemporary self-determination law and comparing it to the British Mandate).

414. Walid Khalidi, Revisiting the UNGA Partition Resolution, J. Palestine Stud., Autumn 1997, at 5, 11, 21 n.35 (internal quotation marks omitted) (quoting Khalidi, Plan Dalet, supra note 156, at 4 app. B at 24 (English translation of the text of Plan Dalet)). The partition favored the Jewish state in terms of not only the percentage of the land but also its quality. The report states, "The Jews will have the more economically developed part of the country embracing practically the whole *of* the citrus-producing area which includes a large number of Arab producers." UN Special Comm. on Palestine, Rep. to the Gen. Assemb. on Its Second Session, ch. 6, pt. I, ¶ 13, U.N. Doc A/364 (Sept. 3, 1947), https://www.un.org/unispal/document/auto-insert-179435/ [https://perma.cc/6XD7-YJ6T] [hereinafter UNSCOP Report].

415. UNSCOP Report, supra note 414, ch. 2, ¶ 176.

416. Kimmerling, Politicide, supra note 291, at 3.

This context is crucial to understanding the legal questions that undergird both the 1948 Nakba and the condition of Nakba. The Israeli regime has not only displaced and dispossessed the majority of Palestinians, but in doing so has entrenched a legal and material reality that denied Palestinian people the right to exercise their political will as a group. The purpose of Nakba must therefore be understood as the denial of a group their inalienable right to self-determination both within the territorial unit and beyond it.

The question has therefore never been whether, but rather to what extent, and by what means, Palestinian self-determination was to be curtailed. Top Zionist leaders in the years leading up to the 1948 Nakba adopted "transfer" as the primary "solution" to what they understood as the "Arab question."[417] The execution of that "solution" produced a modified version of the question, that of the "refugee problem," which Israel has since dealt with in the form of denying return.[418] Displacement and denial of return were therefore the cornerstones of preventing Palestinian self-determination in order to stabilize Zionist sovereignty within the 1949 armistice borders.

But the extent and means by which Israel has suppressed Palestinian self-determination have shifted over time, ultimately reformulating the question from the displacement and conquest of 1948, to the 1967 Israeli occupation of the Palestinian territories.[419] Although the question of Palestinian refugees has never been resolved, the assertion of the military occupation of the 1967 territories, the settlement of these territories with Israeli-Jews, and the extension of a militarily administered apartheid regime have become the new and central forms in which Israel has denied Palestinian self-determination.

The Oslo Accords that established the Palestinian Authority under the pretext of "self-government" in the 1990s have by design prevented Palestinian self-determination and entrenched a reality of "indefinite occupation, statelessness, and deep fragmentation for Palestinians."[420] Once again, the ongoing Nakba has undergone a metamorphosis that has complicated its institutional structure but has maintained its purpose: the denial of Palestinian self-determination.

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417. See supra section I.B.

418. See supra notes 179–181 and accompanying text.

419. See supra section II.A.

420. Seth Anziska, Preventing Palestine: A Political History From Camp David to Oslo 4–5 (2018).

CONCLUSION

"*South Africa has recognized the ongoing Nakba of the Palestinian people through Israel's colonization since 1948, which has systematically and forcibly dispossessed, displaced, and fragmented the Palestinian people, deliberately denying them their internationally recognized, inalienable right to self-determination, and their internationally recognized right of return as refugees to their towns and villages, in what is now the State of Israel.*"

— Vusimuzi Madonsela.[421]

The Palestinian ordeal of ongoing Nakba continues. Over a hundred years since the Balfour Declaration, the West continues to uphold Zionism as its political compass in Palestine, indulging Israel with unconditional material and moral support at the direct expense of Palestinian lands and lives. Palestine thus continues to pose a pressing question to the world, exposing Western hypocrisy, uncovering global hierarchies, and elucidating the colonial conditions still pervasive in the twenty-first century. For the West, Palestine is not only a nuisance but also an enigma, one that defies the solutions of power and embarrassingly turns Joe Biden into "Genocide Joe." For the wretched of the earth, Palestine is a mirror in which to behold their own reflection as they struggle for full liberation from the shackles of colonialism.

This Article contends that Palestine is most accurately comprehended through the concept of ongoing Nakba, an egregious crime against humanity that intersects with the crimes of apartheid, genocide, and indefinite occupation but stands apart as its own indelible tragedy composed of a distinctive foundation, structure, and purpose. For the question of Palestine to be truly resolved, the international community must grapple with the ongoing Nakba. Recognition of Nakba as a universal concept, one acknowledged and prohibited by international norms, is therefore the first step toward a just and lasting solution in Palestine.

The international community has a responsibility to dismantle the ongoing Nakba that twentieth-century colonialism has constructed in Palestine. Zionism—only one modality of Jewish existence in Palestine—is conditioned upon the subjugation of the Palestinian people. There is a long and rich history of Jewish existence in Palestine that is *not* premised on systemic violence, domination, and ethnonational supremacy. Drawing from this tradition may provide inspiration, even though Zionism and its ultimate manifestation in the ongoing Nakba have ruptured and restructured reality in myriad ways that hinder our ability to imagine such futures. But once the Nakba is centered and recognized, it becomes easier

421. Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Verbatim Record, 17, ¶ 3 (Jan. 11, 2024, 10 a.m.), https://www.icj-cij.org/sites/default/files/case-related/192/192-20240111-ora-01-00-bi.pdf [https://perma.cc/X3QU-XG5D] (statement of Vusimuzi Madonsela, South African Ambassador to the Netherlands) (footnotes omitted).

to articulate a vision of freedom and dignity for all people concerned. Justice is not naivety, and the reality of ongoing Nakba is not inevitable.[422]

Undoing the Nakba does not mean resurrecting a past but reimagining a future. Existing approaches have been fixated for years on discussing the solution in terms of one state versus two states, but the "state solution" formulation places the cart before the horse. This statist approach informing the so-called peace process—a process that has rather entrenched the ongoing Nakba—has long obfuscated a simple truth: Statehood and liberation are not synonymous concepts.[423]

To break this impasse and undo the Nakba, we must start from *recognition* and move toward *reconstitution*. If recognition of the Nakba means the acknowledgement of the injustice that modern Zionism has inflicted upon the Palestinian people, reconstitution is concerned with the reformulation of the polity in a way that dismantles the Nakba regime and reconfigures the constitutional design of the system(s) on an egalitarian and democratic basis.

Yet, before any reconstitution can take place, a number of fundamental issues must be addressed. These include return of those Palestinian refugees who desire it; reparations for the victims of the ongoing Nakba; and redistribution of the material resources to ensure that the ongoing Nakba does not morph, repackage, and maintain itself under a private law infrastructure.[424] Taken together, these components therefore provide an initial legal framework to remedy the ongoing Nakba: Recognition, Return, Reparations, Redistribution, and Reconstitution.

The road to undoing the ongoing Nakba and achieving justice in Palestine may be torturous because it stands to disrupt international power structures and radically transmute existing global hierarchies. This is precisely what makes Palestine a possibility that is all the more important to pursue. Palestine and the Nakba offer rich universalist lessons to the world. If Apartheid taught us about the dangers of racialism and the possibility of reconciliation, and the Holocaust taught us about the banality of evil[425] and warned "Never Again," the Nakba can complicate our understanding of these lessons by reminding us that group victimhood is not a fixed category, and that a victimized group may easily become victimizers. That once the abuses of the Nakba are redressed, Palestinians

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422. See Anatomy of a Genocide, supra note 23, ¶ 95 ("The ongoing Nakba must be stopped and remedied once and for all.").

423. Edward Said, The Question of Palestine, supra note 67, at xii ("The most noticeable result of these international effects was, of course, the transformation of a liberation movement into a national independence movement, already implicit in the 1974 [Palestinian National Council] notion of a state and national authority.").

424. Sizwe Mpofu-Walsh, The New Apartheid 13, 17 (2021) (making the argument that "[a]partheid did not die; it was privatised" wherein "[t]he market, not the state, now dictates the boundaries of opportunity, and financial barriers have replaced legal edicts as the key instrument of segregation").

425. Hannah Arendt, Eichmann in Jerusalem: A Report on the Banality of Evil (1963).

will also have to transcend their own victimhood. That we must ensure we always stand in solidarity with the oppressed, the vilified, and the dehumanized.[426] That people need not always be perfect victims to qualify for freedom, dignity, and fundamental rights.[427] Only once we realize these hard truths, Palestine will set us all free.

426. Viet Thanh Nguyen, Palestine Is in Asia: An Asian American Argument for Solidarity, The Nation (Jan. 29, 2024), https://www.thenation.com/article/world/palestine-asia-orientalism-expansive-solidarity/ [https://perma.cc/2YKN-GS2C] ("What is the worth of defending our lives if we do not seek to protect the lives of others? As for whom we should feel solidarity with, the answer is simple albeit difficult: whoever is the cockroach. Whoever is the monster.").

427. El-Kurd, The Right to Speak for Ourselves, supra note 138 ("[H]opes of countering the traditional portrayal of the Palestinian as a terrorist . . . produce[d] a false, flattening dichotomy between terrorists and victims, but the victimhood that emerges within this framework is a perfect victimhood, an ethnocentric requirement for sympathy and solidarity.").